86-919

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LIMPERT BROTHERS, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANKLIN J. RIESENBURGER
200 N. Eighth Street
Vineland, New Jersey 08360

OF COUNSEL:

GREENBLATT & RIESENBURGER
200 N. Eighth Street
Vineland, New Jersey 08360

152pp

QUESTIONS PRESENTED

1. Will this Court continue to sanction the Board's approach of routinely imposing bargaining orders whenever an employer commits unfair labor practices without considering the extent to which the practices occurred.

2. Whether the imposition of the extraordinary remedy of a bargaining order is proper given the Board's failure to address numerous factors necessary to determine whether an election by the use of traditional remedies could be had at the present time.

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No.

LIMPERT BROTHERS, INC.,

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Limpert Brothers, Inc. (Company) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 4, 1986, enforcing an order of the National Labor Relations Board (Board) against the Company.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit is a decision without a published opinion and is reported in a table at 800 *F.2d* 1135 (1986), and is reproduced as Appendix B to this Petition.

The Order of the United States Court of Appeals for the Third Circuit *en banc* denying the petition for rehearing, along with a statement of Circuit Judge Weis Sur Petition for Rehearing is officially reported at 800 F.2d 333 (3d Cir. 1986), and is reproduced as Appendix A to this Petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was issued on August 4, 1986 (A-5). The denial of the petition for rehearing before the United States Court of Appeals for the Third Circuit *en banc* was issued on September 5, 1986 (A-1). This Court has jurisdiction pursuant to 28 *U.S.C.* § 1254(1).

QUESTIONS PRESENTED

1. Will this Court continue to sanction the Board's approach of routinely imposing bargaining orders whenever an employer commits unfair labor practices without considering the extent to which the practices occurred.

2. Whether the imposition of the extraordinary remedy of a bargaining order is proper given the Board's failure to address numerous factors necessary to determine whether an election by the use of traditional remedies could be had at the present time.

STATUTES INVOLVED

Section 29 *U.S.C.* § 157 provides as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 29 *U.S.C.* § 158(a) provides in part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . .

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

An unfair labor practice charge was filed against the Company by Local 56 of the United Food and Commercial Workers Union on June 21, 1982. [Case No. 4-CA-13030]. Additional charges were filed on October 8, 1982 [Case No. 4-CA-13256] and on November 4, 1982. [Case No. 4-CA-13357]. The Board issued a consolidated Complaint on January 21, 1983, alleging, *inter alia*, that the Company had committed violations of Sections 8(a)(1), (3) and (5) of the Act, 29 *U.S.C.* Sections 158(a)(1), (3) and (5). The Company's answer denied all of these allegations.

Hearings were held before the ALJ on April 11, 12, 13 and 14, July 6, and 27, 1983. The ALJ issued his Decision on March 16, 1984 in which he found that the Company had committed numerous unfair labor practices. He ordered various remedies, including an order that the Company bargain with the Union. On June 11, 1984, the Company filed exceptions to all of the ALJ's unfair labor practice findings. On September 24, 1985 the Board issued a Decision and Order affirming, without any substantive analysis, all but one of the ALJ's unfair labor practice findings. The Company filed a Motion for Reconsideration of the Board's Decision on October 17, 1985, which was summarily denied on December 20, 1985.

The Company appealed to the Court of Appeals for the Third Circuit, which on August 4, 1986, denied the Company's petition for review and enforced the Board's order in its entirety.

The Company then filed a petition for rehearing *en banc* which was denied on September 5, 1986.

The Company now seeks a Writ of Certiorari to review the question raised by the Third Circuit's enforcement of the bargaining order in the instant case.

A. The Facts.

The Company is a small, eighty year old seasonal business which manufactures fine fruits and flavors that go into baking goods and ice creams (A-20). The Company was faced with financial ruin in early 1982 (A-21). On May 26, 1982, it was determined that personnel cutbacks were imperative and had to be implemented immediately (A-78-A-79). Due to urgent family business of the Company's president, Bob Limpert, scheduled layoffs had to be rescheduled and were not ultimately effectuated until the morning of June 18, 1986 (A-80).

During the afternoon of June 18, 1982, the Company was informed that a majority of employees then employed had signed authorization cards and was informed by counsel to UFCW Local 56 that as a result of the layoffs, steps would be taken to bring the Company in compliance with the law (A-62-A-63).

B. The Unfair Labor Practices Found.

The ALJ found that by discharging twelve employees on June 18, 1982 because they supported the union, announcing a cutback of hours, threatening closure of the plant and interrogating one employee about his union interest and activities, the Respondent engaged in unfair labor practices in violation of § 8(a)(3) and (1) of the Act. (A-117-A-119). In the face of uncontroverted evidence of the Company's economic problems, the ALJ found that the layoffs were made solely to undermine efforts of the employees to unionize the plant (A-81-A-82).

On September 20, 1982, 94 days after the layoff, the union established a picket line at the Company's plant (A-94). All of the Company's employees reported to work except three

(A-94-A-96). Each of these employees refused to cross the picket line because they feared for their personal safety or the safety of their property (A-94-A-96). None expressed any sympathy for the strike. The picket line was maintained for one week (A-104). The three employees who refused to cross the picket line because of their fears were permanently replaced during the week of the strike. The Company was found to have violated Section 8(a)(3) and (1) when it discharged these employees for failing to cross the picket line and for interrogating these employees about their reasons for failing to cross the picket line (A-118).

Finally, the Company was found to be in violation of Section 8(a)(5) of the Act by refusing to recognize and bargain with the union since June 21, 1982 (A-118-A-119). The ALJ ordered the Company to bargain with the union, to post appropriate notices to cease and desist, and to reinstate all discharged employees with back pay (A-121-A-126).

REASONS FOR GRANTING THE WRIT

The Decision Below Is A Significant Departure From This Court's Decision In *Gissel* Regarding The Issuance Of Bargaining Orders In Lieu Of A Fair Election, And Does Not In Any Way Address Whether A Fair Election By The Use Of Traditional Remedies Could Be Had At The Present Time.

In *NLRB v. Gissel Packing Co.*, 395 *U.S.* 575, 89 *S.Ct.* 1918, (1969), this Court held that if "at one point the union had a majority" and the employer has engaged in unfair labor practices which "have the tendency to undermine majority strength and impede the election processes," then the NLRB after balancing competing interests, may issue a bargaining order. However, this Court never intended that the Board issue bargaining orders routinely. Rather, it was a remedy designed for cases where traditional remedies are insufficient. This Court cautioned that this extraordinary remedy was only to be used in situations where the NLRB "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies is slight and that employee sentiment once expressed through cards would, on

balance be better protected by a bargaining order. *Id.* at 614-615, 89 *S.Ct.* 1918. Moreover, this Court clearly emphasized that there are "less extensive unfair labor practices, which because of their minimal impact on the election machinery, will not sustain a bargaining order." *Id.* at 615, 89 *S.Ct.* 1918.

In direct contravention to the express mandates of this Court in *Gissel,* the Board has taken a simplistic approach, whereby it issues a bargaining order whenever an employer commits numerous or serious violations of the Act, without considering whether or not a fair election could be had by the use of traditional remedies. Judge Cinsberg expressed concerns regarding the Board's approach in his dissenting opinion in *St. Francis Federation of Nurses and Health Professionals v. NLRB,* 729 *F.2d* 844, 861-862, (D.C.Cir. 1984):

> It may be that the Board, disquieted by the slow pace of its own procedures, and aiming to deter employer misconduct, is embarking upon issuance of bargaining orders whenever an employer commits numerous or serious violations of the Act, whether or not it is reasonable to believe a fair election could be held. If this is the approach the Board is taking, it should forthrightly acknowledge what it is doing, and not pretend that it is closely examining cases to evaluate current prospects for an election untainted by past unlawful practices. All reviewing courts would then have an unavoidable obligation to determine whether the Board's extension of remedial policy comports with the governing statute. In sum, I am concerned that the Board, with this court's tolerance, has shrunk to the vanishing point the supposed prerequisite to a bargaining order that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight." (citations omitted)

As this Court instructed in *Gissel:* "It is for the Board and not the courts . . . to make the determination based on its expert estimate as to the effects on the election process of unfair labor

practices of varying intensity. In fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." 395 *U.S.* at 612 n. 32, 89 *S.Ct.* at 1939 n. 32 (citations omitted). Reviewing courts have heeded the direction by this Court and have been reluctant to scrutinize or overturn the Board's result. Any review of the Board's decision is further limited by the Board's practice of simply adopting ALJ findings. This practice gives the Board free reign to impose a bargaining order without articulating its reasons for imposing such a severe remedy and without being subject to questions regarding its decision.

This is an alarming amount of unrestricted power to put in the hands of the Board, especially in view of the anti-democratic nature of the bargaining order. Judge Adams succinctly expressed such a concern in his concurring opinion in *NLRB v. Atlas Microfilming, Division of Sertafilm, Inc.*, 753 *F.2d* 313 (1985):

> The *Gissel* bargaining order, like judicial review itself, is potentially anti-democratic: The order arises from an adversarial union-employer proceeding in which the employees have no voice, and imposes a union on a majority of employees who may oppose it . . . But if an anti-democratic solution is to be adopted, proper circumscription is critical. In a society founded upon democratic principles, it is incumbent upon those institutions that exercise potentially countermajoritarian power to provide explanations for their actions. The requirement of reasoned decisionmaking encourages careful consideration by the institution itself, and is also essential to further the ends of consistency, predictability and rationality. A bargaining order constitutes at once a direct threat to, and an appropriate safeguard for, the democratic nature of union elections. Because it walks the line between undermining and guaranteeing true representation, I believe that a bargaining order requires exceedingly careful consideration.

> While the Board may have given this matter such consideration, we cannot determine whether in fact it did so since it merely adopted the ALJ's findings. Therefore, while I concur because the Board did all that we required under the state of the law in this Circuit, I write to urge the Board and Congress to reconsider this policy.

The Court should consider whether the record as a whole contains substantial evidence to support the Board's bargaining order. *Gissel* makes clear that elections are by far the most favored method of selecting representatives. The Board has ignored the *Gissel* mandates to such a point that a bargaining order has become an "equally attractive—or, in some cases, more attractive—alternative to a Board election." *United Oil Manufacturing Co., Inc. v. NLRB,* 672 *F.2d* 1208, 1219 (3d Cir. 1982), *cert. denied,* 459 U.S. 1178 (1983) (Van Duesen, J., dissenting). This Court should determine whether the Board's approach of routinely imposing bargaining orders is a proper one. *Road Sprinkler v. NLRB,* 681 *F.2d* 11 (D.C. Cir. 1982), *cert. denied, John Cuneo, Inc. v. NLRB,* 459 *U.S.* 1178, 103 *S. Ct.* 831 (1983) (Rehnquist, J., joined by Powell, J., dissenting from denial of cert.)

In determining whether a bargaining order is necessary to insure a free and fair election of representatives, it is equally necessary to consider such factors as the passage of time, employee turnover, changes in management and additional employee misconduct at the time of the enforcement of the bargaining order. The Board has consistently refused to consider subsequent events as being relevant to the imposition of a bargaining order, *NLRB v. Atlas Microfilming,* 753 *F.2d* at 319. Conversely, many of the circuit courts of appeals have held that such considerations are relevant to determining whether a fair election can be conducted: *NLRB v. Heads & Threads Co.,* 724 *F.2d* 282, 289 (2d Cir. 1983) ("Board may issue a bargaining order only after it has taken evidence and made appropriate findings as to the need for the bargaining order at the time it is issued, not at some earlier date"); On occasion the D.C. Circuit has directed the Board to consider specific signifi-

cant events which occurred after an election, *People's Gas Systems, Inc. v. NLRB,* 629 *F.2d* 35, 48 (D.C. Cir. 1980) (where there was both an "extraordinary delay between the initial refusal to bargain and the ultimate formulation of the remedy . . . (and) a clear, uncoerced expression in the interim by the employees that they do not desire the union to represent them"), *NLRB v. Ship Shape Maintenance Co.,* 474 F.2d 434, 443 (D.C. Cir. 1972) (where there was an "extraordinary rate of turnover" in the affected unit); *NLRB v. Armcor Ind.,* 588 *F.2d* 821 (3rd Cir. 1978) (Board must consider present conditions and must "demonstrate that the present employees are so intimidated that they probably cannot make a knowing and free choice in a supervised election); *NLRB v. Western Drug,* 600 *F.2d* 1324, 1326 (9th Cir. 1979).

Numerous factors exist in this case which establish that a fair election can be had at this time and that the issuance of a bargaining order is improper:

a. the passage of time since Petitioner's last alleged unfair labor practice (September 27, 1982);

b. substantial turnover in Petitioner's work force;

c. the lack of intimidation of employees caused by Petitioner's alleged commission of unfair labor practices;[1]

d. the lack of any continuance of alleged unfair labor practices by Petitioner; and

e. the fact that two prior Board elections were held at Petitioner's facility. Petitioner won both prior elections without any objection or any unfair labor practice charge. (A-132-A-135).

These factors demonstrate both that traditional Board remedies are sufficient to cure any unfair labor practices that Petitioner may have committed in 1982 and that it is patently

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[1] The Court in the *NLRB v. Pace Oldsmobile, Inc.,* 739 *F.2d* 108 (2d Cir. 1984), held that a strike by employees subsequent to the commission of unfair labor practices demonstrates that the employees were not intimidated by those unfair labor practices. In the instant case, alleged discriminatees did conduct a strike at the Company's facility in September of 1982 following Respondent's alleged commission of several unfair labor practices. (A-94, A-131)

improper and unfair—both to the Company and its current employees—to issue a bargaining order. *See,* e.g., *NLRB v. J. Coty Messenger Service,* 763 *F.2d* 92 (2d Cir. 1985); *NLRB v. Marion Rohr Corp., Inc.,* 714 *F.2d* 228, 231 (2d Cir. 1983). Neither the ALJ or the Board gave any recognition to these factors or acknowledged that in a proper analysis they may be relevant considerations.

At the same time, there has been a substantial reduction in the work force. The reduction in the work force is directly related to the financial difficulties that the Company began to experience in 1982. Such a reduction in the work force saved the Company from bankruptcy. This reduction is relevant "not only because the division of sentiment among the remaining employees may be different, but also because employees may view the benefit of unionization in a far different light when the economic plight of the employer has substantially diminished their ranks." *Peerless of America, Inc. v. NLRB,* 484 *F.2d* 1108, 1121 (7th Cir. 1973).

In *Gissel,* this Court agreed with the Board's finding of unlawful refusals to bargain combined with other, coercive, unfair labor practices, and still held that if possible, elections should be held to determine employee choice. 395 *U.S.* at 614, 89 *S.Ct.* at 1940. Fundamental fairness necessitates a remand to the Board and a mandate by this Court directing it to consider whether present employees of the Company can make a knowing and free choice by a Board election by the use of traditional remedies.

CONCLUSION

The Board and the court below have adopted an approach in contravention to this Court's mandates in *Gissel.* It is respectfully submitted that this petition for writ of certiorari should be granted to review whether such an approach is a proper one.

Respectfully submitted,

FRANKLIN J. RISENBURGER
200 N. Eighth Street
Vineland, New Jersey 08360

OF COUNSEL:

GREENBLATT & RIESENBURGER
200 N. Eighth Street
Vineland, New Jersey 08360

December, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3587 and 86-3018

LIMPERT BROTHERS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent
(NLRB Nos. 4-CA-13030, 4-CA13256 and 4-CA-13357)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITS, ADAMS, GIBBONS, WEIS, HIGGINBOTHAN, SOLVITER, BECKER, STAPELTON and MANSMANN, Circuit Judges

The Petition for rehearing filed by petitioner in the above entitles case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Dated: September 5, 1986 Judge

Limpert Brothers, Inc. v. National Labor Relations Board

Nos. 85-3587 and 86-3018

STATEMENT OF JUDGE WEIS

SUR PETITION FOR REHEARING

I have remonstrated on numerous occasions against issuance of bargaining orders by the Board because they deprive employees of their right to select a bargaining representative through a secret ballot. See e.g. NLRB v. Keystone Pretzel Bakery, Inc., 696 F.2d 257, 266 (3d Cir. 1982; Electrical Products Div. of Midland-Ross Corp. v. NLRB, 617 f.2d 977, 989 (3d Cir. 1980). However, my views do not command a majority of the members of this court, and my role as an appellate judge requires that I abide by the precedent set by the court.

The arguments made by the employer in his petition for rehiring on the credibility of various witnesses are strong indeed, but our review of the evidence is severely limited by statute. In appeals from the Board we must affirm its findings if they are supported by substantial evidence. We are not free to reweigh the evidence nor are we permitted to decide a case as we might have had we conducted the original hearing.

Because of the limitations imposed by precedent and the restricted scope permitted by statute, I join in the order denying panel rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3587 and 86-3018

LIMPERT BROTHERS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

(NLRB Nos. 4-CA-13030, 4-CA-13256 and 4-CA-13357)

ON PETITION FOR REVIEW AND CROSS APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Argued
July 21, 1986

Before: GIBBONS, WEIS and SLOVITER, Circuit Judges

DAVID F. GIRARD-diCARLO,ESQ.
HOWARD I. HATOFF, ESQ.
JEFFREY E. MYERS, ESQ.
(Argued)
BLANK, ROME, COMISKY &
McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Attorneys for Petitioner,
Limpert Brothers Inc.

COLLIS SUZANNE STOCKING
ELLEN O. BOARDMAN(Argued)
Attorneys
National Labor Relations
Board
Washington, D.C. 10570

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGENS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

ELLIOTT MOORE
Deputy Associate General Counsel

Attorneys for Respondent,
National Labor Relations Board

JUDGMENT ORDER

Limpert Brothers, Inc. petitions for review of an order of the National Labor Relations Board finding that it committed unfair labor practices in connection with a union organizing effort and ordering it to bargain with the union in question. The National Labor Board cross-petitions for enforcement of its order.

It is ORDERED and ADJUDGED that the Limpert Brothers, Inc. petition for review be and is hereby denied and that the Board's

order be and is hereby enforced in full.

Costs are taxed in favor of respondent.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, Clerk

DATED: August 4, 1986

276 NLRB No. 37

D-3087
Vineland,N.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIMPERT BROTHERS, INC.

and

LOCAL 56, AFL-CIO, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL--CIO--CLC

Cases 4-CA-13030
4-CA-13256
4-CA-13357

DECISION AND ORDER

On 16 March 1984 Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed a brief in opposition to the Respondent's exceptions to the judge's decision.

The National Labor Relations Board has deligated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm thejudge's

rulings, findings, [1] and conclusions [2] only to the extent consistent with this Decision

---

[1] Contrary to the judge, we do not find that the Respondent violated Sec. 8(a)(3) of the Act in 17 June 1982 when General Manager Pearl Giordano announced to the employees that, due to a lack of sales, there would be a cutback to a 3 or 4 day workweek. The record indicates that the Respondent never instituted the announced cutback of hours. However, in agreement with the judge, we uphold his finding that the announcement violated Sec. 8(a)(1).

[2] In agreeing with the judge that the Respondent violated Sec.(a)(3) and (1) when it discharged employees Raymond Fitzgibbon, Joseph DeMaio, and Margaret DiMatteo for refusing to cross the picket line solely out of fear for his own personal safety, and are this afforded the same protection inder the Act as the unfair labor practice pickets. Ashtabula Forge, 269 NLRB 774 (1984) (Chairman Dotson's Dissent). 276 NLRB No.37

and Order, and to adopt the recommended Order as modified.3

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3 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Through inadvertence, the judge omitted our normal injunctive language from his Order. We will insert that and, as we find that the violations committed by the Respondent are of an egregious nature, we will give a broad cease-and-desist order. See Hichmott Foods, 242 NLRB 1357.

Member Dennis agrees that a bargaining order is appropriate based on her concurrence in Regency Manor Nursing Home, 275 NLRB No. 171 (July 31, 1985).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Limpert Brothers, Inc., Vineland, New Jersey, it officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following paragraph as paragraph 1 (g) of the administrative law judge's order.

"(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.
Dated, Washington D.C. 24 September 1985

_____

Donald L. Dotson, Chairman

_____

Particia Diaz Dennis, Member

_____

Wilford W. Johansen, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agnecy of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 56, AFL-CIO, Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to close our plant for supporting Local 56, AFL-CIO, Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production, maintenance, shipping and laboratory employees employed by Limpert Brothers, Inc. at its Vineland, New Jersey facility, excluding all office, clerical employees, salesmen, guards and supervisors as defined in the National Labor Relations Act.

WE WILL offer Pauline Pruitt, Laverne Jackson, Donna Barriento, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker, Gail Ocasio, John Mazzi, Susan Johnson, Raymond Fitzgibbon, Joseph DeMaio, and Margaret DiMatteo immediate and full reienstatement to their former jobs or, if those jobs no longer exist, to

subsequently equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make their whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed form our files any reference to their discharge and that their discharge will not be used against them in any way.

LIMPERT BROTHERS, INC.
(Employer)

Dated _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Independence Mall, 7th Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106. Telephone 215-597-7643.

JD--107--84
Vineland, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LIMPERT BROTHERS, INC

and

Cases 4-CA-13030
4-CA-13256
4-CA-13357

LOCAL 56, AFL-CIO,
CHARTERED BY UNITED FOOD
AND COMMERCIAL WORKERS INTERNATIONAL UNION,
AFL-CIO-CLC

Margarita Navarro, Esq.,
William Slack, Esq., of
Philadelphia, PA,
for the General Counsel.

Mary Crangle, Esq.,
Hilery Klein, Esq., of
Haddonfield, NJ,
for the Charging Party.

Daivd F. Girard-di Carlo, Esq.,
Frederick J. Bosch, Esq., of
Philadelphia, PA,
for the Respondent.

DECISION

Statement of the Case

ELBERT D. GADSEN, Administrative Law Judge: Charges of unfair labor practices were filed on June 21, October 8 and November 28, 1982 by United Food and Commercial Workers Union, Local 56, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, against Limpert Brothers, Inc., herein called the Respondent. On behalf of the General Counsel, the Regional Director for Region 4 issued a complaint in the first two cases on November 30, 1982, and thereafter issued an order consolidating those cases with a third case (4-CA-13357).

The consolidated complaint alleges that Respondent solicited a statement from an employee as to whether the employee had been threatened by fellow-employee strikers; that Respondent interrogated an employee about the identity of employees engeged in a strike against the Respondent; that

Respondent threatened to close its business if employees continued to support the Union, all in violation of Section 8(a)(1) of the Act; and that Repondent reduced employees' hours of work, terminated a substantial number of employees, and thereafter failed and refused to reinstate said employees, including some employees who had offered to return to work, because all of said employees supported the Union, in violation of Section 8(a)(3) of the Act; and that Respondent refused the Union's demand for recognition on June 18-21, 1982, and became engaged in conduct designed to undermine the Union's majority status, in violation of Section 8(a)(5) of the Act.

On January 21, 1983, Respondent filed an answer denying that it has engaged in any unfair labor practices as set forth in the consolidated complaint.

A hearing in the above matter was held before me in Vineland, New Jersey on April 11, 12, 13 and 14, 1983, and in Philadelphia, Pennsylvania on July 6 and 27, 1983. Briefs have been received from counsel for the

General Counsel, counsel for the Charging Party and counsel for the Respondent, respectively, which have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. Jurisdiction

At all times materials herein, the Respondent has been a corporation duly organized under, and existing by virtue of, the laws of the state of New York. It is engaged in the wholesale processing of fruits and flavors for the ice cream business at its facility located in Vineland, New Jersey.

During the fiscal year ending October 31, 1981, Respondent purchased materials in an excess of $50,000 directly from points outside the state of New Jersey.

The complaint alleges, the Respondent admits, and I find that Respondent is engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that United Food and Commercial Workers Union, Local 56, AFL-CIO, chartered by United Food and Commercial Workers International, AFL-CIO-CLC, is, and has been at all times materially herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background Facts

For the past 30 years, Respondent has been engaged in the business of processing fruits and manufacturing ice cream flavors and toppings for ice cream enterprises at its location in Vineland, New Jersey. Its ice cream product is largely seasonal with peak demand for ice cream occurring in late

spring and summer. For most of its 30 years in operation, Respondent has enjoyed a profitable business except for the year 1981 and the first part of 1982, when it commenced to suffer substantial losses in profits.

During these proceedings the parties stipulated that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of section 9(b) of the National Labor Relations Act:

> All production, maintenance, shipping and laboratory employees employed by Limpert Brothers, Inc. at its Vineland, NJ facility, excluding all office clerical employees, salesmen, guards and supervisors as defined in the National Labor Relations Act:

The parties further stipulated that on the morning of June 18, 1982, the following named employees, their department, and wages as described below, were included in the above-described appropriate unit:

Charles Adams, maintenance------$5.00 per hour
Donna Barriento, general labor--$3.60 per hour
Joseph DeMaio, general labor----$5.50 per hour
Vincent DiBiase, general labor--$4.00 per hour
Michael DiMatteo, shipping------$4.75 per hour
Gerald Giordano, general labor--$3.35 per hour
Lees Giordano, general labor----$3.35 per hour
Carlos Gonzalez, general labor--$5.25 per hour
Leonard Graff, general labor----$4.25 per hour
Clotilde Irezarry, general labor$3.45 per hour
Laverne Jackons, general labor--$3.35 per hour
Eliseo Jimenez, general labor---$4.50 per hour
Diane Johnson, general labor----$3.35 per hour
Susan Johnson, general labor----$3.35 per hour
Charles Licaretz, general labor-$6.50 per hour
Richard Menz, shipping----------$4.25 per hour
Robert Milana, general labor----$3.35 per hour
Gail Ocasio, general labor------$3.35 per hour
Joseph Oliver, laboratory-------$3.85 per hour
Sharon Parker, general labor----$3.55 per hour
Wenceslao, Perez, general labor-$4.25 per hour
Pauline Pruitt, general labor---$3.75 per hour
Ronald Reed, shipping-----------$4.25 per hour
Jimmy Riggs, general labor------$4.00 per hour
Carmen Rodriguez, general labor-$3.35 per hour
Mervin Roman, general labor-----$3.35 per hour
Wilberta Santiago, general labor$3.62 per hour

Ron Shepherd, general labor-----$4.75 per hour
Lewis J. Smith, general labor---$3.50 per hour
Ronald Tobolski, general labor--$3.75 per hour
Miguel Velez, general labor-----$3.35 per hour

The parties agreed not to include John Mazzi in the appropriate unit because they are in dispute as to his status as an employee versus a supervisor. Mazzi works in maintenance at a rate of $6.25 an hour. General Counsel contends that Mazzi is not a supervisor while the Respondent contends he is a supervisor. 1/

B. The Organizing Effort of the Respondent's Employees

A composite of the credited evidence of record established that in response to a telephone call from employees Pauline Pruitt and Carlos Gonzalez on June 3, 1983, Michael Matway, business representative of Local 56, met with Pruitt and Gonzalez at the Best Western Motel in Vineland, New

1/ The facts set forth above are uncontroverted and are not in conflict in this record.

Jersey. On June 16, 1983, representative Matway and his associate, Gene Christanti, met at the home of Pauline Pruitt with the following employees: Pauline Pruitt, Carlos Gonzalez, Carmen Rodriguez, Wenceslao Perez, Eliseo Jimenez, John Mazzi, Laverne Jackson, Donna Barriento, and Gail Ocasio. Union authorization cards were distributed during the meeting by representative Matway, who told the employees when he received a substantial majority of signed cards, the cards would be used to obtain recognition from Respondent, and the Union would simultaneously file a petition for a secret ballot election. Matway also said if he received signed cards from a majority of the employees, he would withdraw the petition. The following employees signed union authorization cards for Local 56 on the date set opposite their respective names as follows:

Pauline Pruitt-------6/16/82
Carlos Gonzalez------6/16/82
Wenceslao Perez------6/16/82
Donna Barriento------6/16/82
Eliseo Jimenez-------6/16/82

Laverne Jackson------6/16/82
Gail Ocasio----------6/16/82

Some of the employees (Leonard Graff, Lewis Smith, John Mazzi, Donna Barriento, Laverne Jackson, Pauline Pruitt and Ron Tobolski) who attended the organizing meeting and/or signed authorization cards on the evening of June 16, engaged in a Union solicitation campaign in the plant on the next morning and afternoon, June 17. During the break and lunch periods on the 17, except Clotilde Irezarry, the following employees signed authorization cards on the date set opposite their respective names:

Wilberta Gantiago----6/17/82
Clotilde Irezarry----6/17/82, evening
Leonard Graff--------6/17/82
Sue Johnson----------6/17/82
Lewis Smith----------6/17/82
Carmen Rodriguez-----6/17/82
Sharon Parker--------6/17/82
Robert Milana--------6/17/82
Ron Tobolski---------6/17/82
Ronald O. Reed-------6/17/82

The above list of signed cards represent 19 out of the list of 31 employees to which the parties stipulated, constituted an appropriate unit on June 18, 1982. However, during and subsequent to the hearing, Respondent challenged either the authenticity of the signatures, or the validity of the cards bearing the signatures of the following employees:

1. Ronald Shepherd
2. Miguel Velez
3. Clotilde Irezarry
4. Carmen Rodriguez
5. Gail Ocasio
6. Eliseo Jimenez
7. Susan Johnson
8. John Mazzi

At the hearing herein, Respondent did not challenge the authenticity of the authorization cards of employees Donna Barriento, Carlos Gonzalez, Leonard Graff, Lawrence Jackson, Eliseo Jimmenez, John Mazzi, Robert Milana, Sharon Parker, Wenceslao

Perez, Pauline Pruitt, Lewis Smith and Miguel Velez. The language on the card signed by each of the above-named employees is printed in unambiguous English or Spanish, designating the Union as the collective bargaining representative of the signer. Respondent did not produce any evidence that such printed language was cancelled or misrepresented to any signatory by a card solicitor, to the effect that the printed language should be desregarded. In the absence of such evidence, the card is not invalidated. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969). At most, Respondent makes reference to the fact that Union representative Matway testified he saw Wenceslao sign a card at the June 16 organizing meeting, when in fact Wenceslao Perez was not present at that meeting.

However, I was persuaded by the circumstances and Matway's demeanor, that this misstatement by him was an honest mistake of mental recall, as I believe he admitted he was mistaken. I deem such a mistake quite possible and probable of a witness trying to recall the identity of all of

the employees who were present at a meeting held several months prior to this hearing. I therefore find that the cards of all of the above-named employees are valid, and should be counted in determining majority support for the Union on June 17-21, 1982. Since John Mazzi testified without dispute, that he solicited and witnessed Ronald Reed and Ronald Tobolski read and signed their card and returned it to him, which Mazzi turned in to Matway on June 17, both cards are valid and should be counted in determining majority support for the Union.

The Authorization Card of Ron Shepherd

As the record shows, all of the above signed cards are "single purpose" union authorization cards, authorizing the Union to represent the signatory thereof for purposes of collective bargaining with the Respondent. Counsel for Respondent argues that Ron Shepherd's card is invalid because in June Shepherd had instructed card solicitor, John Mazzi not to submit his signed card to the Union. However this is not necessarily an accurate account of

this proceeding. Nonetheless, John Mazzi testified, and I credit his undisputed testimony, that employee Ron Shepherd signed the Union card and returned it to him (Mazzi), requesting that Mazzi not submit the card to the Union until he instructed him to do so. Mazzi testified he complied with Shepherd's instructions until Shepherd directed him to submit the card to the Union in August or September, after Shepherd was laid off.

It is particularly noted that Shepherd's card is dated June 19, 1982. However, since Mazzi had not submitted or should not have submitted the card to the Union until August or September, the Union did not legally have Shepherd's card on June 18-21, when the Union demanded recognition by the Respondent. This conclusion is consistant with the credited testimony of Mazzi. If, on the contrary, Mazzi did in fact submit Shepherd's card to the Union on June 19-21, he did so against the instructions and without the authorization of Shepherd. In either event, Shepherd's card, although valid when submitted to the Union in August or September,

was not valid for purposes of tabulation on June 19-21, when the Union made its demand to Respondent for recognition. Consequently, Shepherd's card cannot be counted to determine whether the Union represented a majority of Respondent's employees on June 21, when Respondent received the Union's demand for recognition (General Counsel's Exhibit 3), because the union did not or should not have had, Shepherd's card nor his authorization for the card at any time in June of 1982. Therefore, Shepherd's card will not be counted in determining whether the Union represented a majority of Respondent's employees in June 1982.

The Authorization Card of Miguel Velez

Respondent did not object to the admission in evidence of Miguel Velez's authorization card (General Counsel's Exhibit 2-c), but now it argues in its brief that Velez's card should be found invalid, allegedly because General Counsel did not produce evidence authenticating that signature or the intent of the signatory. However, it is noted that Union representative Matway

testified without dispute, that he received Velez's card along with 11 other signed cards during an organizing meeting at Pauline Pruitt's home on June 17. When Respondent's counsel was asked did he have any objections to admission of the card in evidence, counsel said, "No." The purpose of the single purpose card is clearly printed on its face in Spanish. Counsel for Respondent has not offered any evidence even intimating that the signature on the card is not authentic, or that the signer did not intend to sign it. Thus, it may be reasonably inferred from the fact that the purpose on the card is clearly printed on its face in Spanish; that the name Miguel Velez, which appears on it, is a Spanish name; that Respondent stipulated that a Miguel Velez was in its employ on June 18, 1982; and that Respondent, who must have in its personnel records or cancelled checks, the signature of Velez, did not offer any such evidence to refute the genuineness of the signature, or the lack of intent of the signer.

Thus, I conclude and find that the General Counsel has sufficiently established

the validity of Miguel Velez's card, and his card should be counted in determining whether a majority of Respondent's employees supported the Union on June 18-21, 1982.

The Authorization Card of Gail Ocasio

Respondent also contends that although the General Counsel may have authenticated the card of Gail Ocasio, General Counsel has nevertheless failed to establish the validity of Ocasio's card because Ocasio was not called to testify about her intent to sign, and because her solicitor, Laverne Jackson's testimony shows that Union representative Matway's explanation for the card to Ocasio and herself, misrepresented its purpose as follows:

> He [Matway] told us these cards was to see did we have enough votes to establish - He said that if we signed these cards that the benefits and all this here, he told us that this card was not to say that we had a union in there, it was to get enough votes in so we could organize to go to the head

men and see would they okay, you know, the union be recognized in there.

The most critical and strict reading of Jackson's above-quoted testimony reveals that Matway told them (Ocasio and Jackson) the signing of a card itself did not mean they had a union. However, he told them if they succeeded in getting enough cards signed (by a majority of employees) Matway would approach management and demand recognition. This construction of Jackson's testimony is not inconsistent with Matway's testimony about what he told the employees during the organizing meeting on June 16. At that time, Matway testified he told the employees if they obtained signed cards by a majority of the employees, he would seek recognition of management and simultaneously file a petition for a secret ballot election.

In the instant case, the language on the card is clear and unambiguous on its face. Nowhere in the above-quoted language is it indicated that Matway deliberately and clearly directed Ocasio or Jackson to

disregard the language on the card, or otherwise told them their card would be used for no purpose other than to get an election. In the absence of such or similar statements by Matway, there is no evidence that Matway misrepresented the purpose of the card, or that Ocasio did not intend to sign the card she did in fact sign. It is well established that a solicitor of a card who testifies he or she witnessed and identifies the signature of the signer, is sufficient to satisfy authentication and validity of the card. Jeffrey Manufacturing Division, 248 NLRB 33 (1980). Under such circumstances, the signatory need not appear and testify. Additionally, the reading of the above-quoted testimony of Jackson does not substantiate Respondent's contention that Matway misrepresented the purpose of the card. Consequently, I conclude and find that Ocasio's card satisfies the legal requirements for both authenticity and validity. Jeffrey Manufacturing Division, supra; Keystone Pretzel Bakery, Inc., 242 NLRB 492 (1979).

The Authorization Card of Eliseo Jimenez

Respondent did not object to the admissibility of Eliseo Jimenez's authorization card but argues that it is invalid because the card was filled in by his wife, at his direction, and signed by Jimenez himself; because Jimenez said he did not read the card; because the purpose of the card was misstated to Jimenez by Carlos Gonzalez; and because Jimenez never understood the purpose of the card. However, Respondent's arguments are not substantiated by the evidence of record. In Jimenez's testimony quoted in Respondent's brief (pp. 116-117), Jimenez was asked by counsel for Respondent, did Gonzalez tell him the purpose of the card. Jimenez said "Yes, he said it was to form a union..." Moreover, Jimenez testified that he went to the organizing meeting on June 16 with Gonzalez, because he (Jimenez) does not speak English. The record contains Union representative Matway's clear and credited testimony of what he told the employees was the purpose of the authorization cards at the June 16 meeting.

It may be reasonably inferred from Jimenez's testimony that Gonzalez, in whom Jimenez obviously had confidence to translate from English to Spanish, what Union representatives told the employees. Matway told the employees if a majority of employees signed cards, he would approach management and demand recognition, and simultaneously file a petition for a secret ballot election. The undersigned does not have any reason to believe that Gonzalez did not explain the purpose of the card to Jiminez as Matway explained the purpose of the cards to the employees. Additionally, the purpose of the card is printed in Spanish on Jimenez's card and Jimenez is literate in Spanish. The fact that the card was filled in by Jimenez's wife at his direction is clear evidence that Jimenez knew and intended to sign the card with a full appreciation of its significance. Since he is literate in Spanish it must be presumed that he knew and understood the contents and purpose of the card. Jeffrey Manufacturing Division, 248 NLRB 33 (1980). Consequently, there is no reasonably established basis for decla ng Jimenez's card invalid, and I

find his card valid for the purpose of determining whether the Union enjoyed majority support on June 17-21, 1982.

The Authorization Card of Susan Johnson

Respondent argues that the authorization card of Susan Johnson must be deemed invalid because employee Donna Barriento filled in the information on the card without a showing that Johnson directed her to do so; and that Johnson testified she only read the information filled in and did not testify she read the printed purpose on the card. While some of Respondent's recitation of the facts are correct, it is particularly noted that the record does not contain any evidence that Johnson did not know the purpose of the card she signed. In fact, the evidence shows that she testified she signed the card because fellow employee Donna Barriento asked her to sign a Union authorization card. She assented and signed a card. Johnson therefore knew the card was to get a union in the plant. Although she may not have read the stated purpose on the card, the evidence did not establish

that Barriento or anyone else ever told Johnson the card was for the exclusive purpose of obtaining a union election. The law is well settled as the Supreme Court stated in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575; 584 (1969), approving Board law on determining the validity of authorization cards, as enunciated in the Cumberland Shoe Corporation, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1975); reaffirmed in Levi Strauss & Co., 172 NLRB 732 (1968):

> Under the Cumberland Shoe doctrine, if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election.

In the instant case the evidence does not establish that Barriento or any other

union organizer or representative told Johnson the single purpose authorization card was to be used solely for the purpose of obtaining an election. Keystone Pretzel Bakery, Inc., 242 NLRB 492 (1979). As counsel for the Respondent concedes, Johnson, from all outward appearance is literate. In the absence of any evidence to the contrary, Johnson is presumed to have known and understood the contents and purpose of the card which she signed. Johnson's card is therefore valid and should be counted in determining whether a majority of the employees supported the Union on June 17-21, 1982.

The Authorization Card of Clotilde Irezarry

Counsel for the Respondent argues that the authorization card of Clotilde Irezarry is invalid because Union card solicitor Eliseo Jimenez, used coercive tactics in inducing her to sign the card, and told her the card would be used to secure a union representative election.

Irezarry, an elderly Hispanic woman with a limited understanding of English

and a fair reading and speaking knowledge of Spanish, has been employed by Respondent for 10 or 11 years, until she was laid off subject to recall in November 1982. Pursuant to subpoena, she testified that she had refused to sign a union authorization card for Carlos Gonzalez on several occasions in June. Elisel Jimenez, also Hispanic, came to her house on June 17 as she was preparing to go out. She said he requested her to sign an authorization card. She kept refusing to sign the card but Jimenez kept insisting that she sign the card. Without reading the card, Irezarry said she finally signed the card to get rid of Jimenez.

On the contrary, Eliseo Jimenez, sho also testified pursuant to subpoena prior to Irezarry, acknowledged he went to Irezarry's house on behalf of the organizing employees to obtain her signature on a card. Jimenez is also Hispanic and literate in Spanish but not in English. He testified he took the card to Irezarry's home because the other employees did not know where she lived. When he arrived, he said Irezarry

asked for the card, he gave it to her, and she signed it without any pressure from hime. "She signed it because she wanted to, no body pressured her." Although Jimenez did not explain what he meant by "pressuring" Irezarry, neither did counsel for Respondent explain or address any evidence in the record to support his charge that Jimenez used coercive tactics against Irezarry to obtain her signature.

Counsel for Respondent also suggests, by cases cited in support of his argument, that Irezarry was harassed into signing the card. Although the record shows Irezarry was approached several times by Gonzalez to sign a card, which she refused to do, Jimenez approached her at her home on one occasion, June 17. While I'm not persuaded that the visit and any urging by Jimenez to have Irezarry sign a card amounted to harassment, the conflicting testimony of Irezarry and Jimenez raises a crucial question of credibility.

In addressing the question of credibility of the two witnesses (Irezarry and Jimenez),

it is first noted that both witnesses are Hispanic, both speak, read and understand Spanish, and the authorization card which each (Jimenez and Irezarry) signed (General Counsel's Exhibits 2(p) and 2(n)), respectively, is printed in Spanish. The clear and unambiguous wording on the card states that "I hereby authorize the United Food & Commercial Workers International Union, AFL-CIO-CLC, or its chartered local union(s) to represent me for the purpose of collective bargaining."

In almost narrative fashion, Irezarry testified that after she refused to sign, Jimenez told her there would be no trouble -- no problems... that it did not mean anything. She said she told Jimenez she did not want to get involved and did not want to sign... that she was in a hurry to go out and Jimenez kept insisting that she sign. She said he told her the only problem was the day of the election, at which time she could vote in favor or against the Union, or she did not have to vote at all. Without reading the card she said she signed the card to get rid of Jimenez.

Although Irezarry testified she did not read the card before she signed it, but merely signed it to get rid of Jimenez, the record shows that she also testified in response to specific questions by General Counsel as follows:

> Q. Did you know why eliseo wanted you to sign your card?
> A. He didn't say anything to me.
> Q. That was not the question I asked. Do you know why he wanted you to sign the card?
> A. He wanted for me to sign the card because they were collecting signatures in order to have a union at our place of work, but I was not in agreement with that.
> Q. So at that time you signed this card, you knew you were signing the card because they were trying to get a union into the company.
> A. I knew that.

The latter testimony of Irezarry is in conflict with her earlier testimony as to what Jimenez said to her about the card,

further complicating her credibility. As I observed the demeanor of Irezarry as she testified, I was persuaded that she understood most of the questions propounded to her through an experienced Spanish-English interpreter, better than the impression she attempted to convey that she did not understand. This conclusion is supported by the fact that Irezarry was testifying pursuant to subpoena. Her demeanor clearly indicated she was reluctant to testify by the lapse of time before she responded to questions, which I was persuaded was not due to her lack of understanding the questions. I particularly noted how she frequently looked in the direction of Respondent's representatives before she answered many of the questions asked by counsel for the General Counsel, as well as questions asked by the bench. I was further persuaded that Irezarry was not being fully truthful by the fact that she also remained employed by Respondent long after the mass termination of employees in June; and also by the fact that she was laid off, rather than terminated in November, with the expectation of being recalled by

the Respondent. Under these circumstances I received the distinct impression that Irezarry wanted to be recalled to work and did not want to give Respondent the impression that she supported the organizing effort of the Union in any way. Moreover, the record evidence does not show that Irezarry ever tried to rescind her authorization card.

I credit Jimenez's testimony because I was persuaded by his demeanor and the consistency with which he testified that his testimony was essantially truthful. Conspicuously absent in the credited evidence is any language by Jimenez which deliberately and clearly directed Irezarry to disregard the Spanish language on her card reciting its purpose, or that he otherwise assured Irezarry her card would be used for no purpose other than to get an election. In the absence of such misrepresentations, I find Irezarry's card to be a valid designation of the Union as her collective bargaining representative. Her card should be counted in determining majority support of the Union on June 17-21, 1982. Keystone Pretzel Bakery, Inc., 242

NLRB 492, 494 (1979). Federal Alarm, 230 NLRB 518, 522 (1970), Levi Strauss Co., 732, 733 (1968), enf'd 441 F.2d 1027 (6 Cir. 1980).

The Authorization Card of Carmen Rodriguez

Respondent challenged the validity and authenticity of the authorization card of Carmen Rodriguez because she authorized a friend to fill it out and sign it on her behalf. In this regard, Rodriguez testified she was given a card (printed in Spanish) by Carlos Gonzalez, who told her it was for the Union and requested her to fill it out and return it to him. Rodriguez is Hispanic, and she testified she read the card and took it with her when she went home for lunch. While at home, she asked her friend, Maria, to fill out the card and sign her (Rodriguez) name on it. Maria read the card to her, filled it out, and signed Rodriguez's name on it and returned it to Rodriguez, who in turn, returned it to Gonzalez. Although Rodriguez testified she understood why she wanted to sign the card, there was some language difficulty

as she testified through the assistance of a good English-Spanish interpreter. After several questions were asked which the bench did not deem clarifying, the bench asked Rodriguez did she tell Maria to sign the card because she wanted the Union, and she said "yes."

On cross-examination Rodriguez said she signed the card because her fellow workers were signing a card. She acknowledged she stated in her affidavit given to the Board on June 24, 1982, that she had signed a card, without explaining that her frient, Maria, had signed the card on her behalf. When asked why did she neglect to so inform the Board, she said she thought she would have a problem if she told the Board Maria had signed the card on her behalf. Presumably Rodriguez thought she could not authorize another person to sign on her behalf, especially if such fact became known by a Board agent. Since Rodriguez is a lay person, I was persuaded that her assumption and explanation were truthful, even though erroneous, because an employee may authorize another person to sign his or her name on

an authorization card. La Mousse, Inc., 259 NLRB 37, 42, fn 10.

Although Rodriguez commenced to cry as she testified about her having Maria sign a card on her behalf, and as she explained the conflict in her testimony with the statement in her affidavit, I was nonetheless persuaded by her explanation and demeanor, that she was telling the truth. I also received the distinct impression that she was upset that the conflict in her testimony with her statement in her affidavit was revealed on examination, but not because she was not telling the truth. I was also satisfied that Rodriguez understood the purpose of the card and that she authorized Maria to sign her (Rodriguez) name on a card because she was in favor of the Union.

During the hearing herein, Rodriguez in effect adopted if not ratified Maria signing of the card on her behalf as it was signed by Maria pursuant to Rodriguez's authorization. At no time thereafter did Rodriguez attempt to rescind her card. Under

these circumstances, I find Rodriguez's card valid for purposes of determining whether a majority of Respondent's employees designated the Union as their collective bargaining representative on June 17, 1982. La Mousse, Inc., supra; Standard Coosa-Thatcher, Carpet Yarn Division, 257 NLRB 304, 309 (1981), enf'd 691 F.2d 1133 (4th Cir. 1982).

The Supervisory Status of John Mazzi

Respondent argues that all of the authorization cards signed by employees at the June 16 meeting are invalid because of the presence of John Mazzi whom Respondent argues was a supervisor. In this regard, the evidence shows that Mazzi was employed by Respondent from June 1954 to June 1982. During his later years he worked along with Charles Adams in the plant's maintenance department as a maintenance mechanic -- keeping production machinery operational -- and as a boiler engineer for $6.25 per hour. The majority of Mazzi's time was spent maintaining the production machinery and tending the plant's boiler, although

he and Adams were occasionally assisted by employees from other departments. The record is barren of any evidence that Mazzi had authority or in fact exercised authority to hire, layoff, suspend, transfer, recall, promote, demote, reward, discharge or otherwise discipline employees, or that he exercised independent judgment in performing supervisory tasks. Nor did Respondent proffer any evidence that Mazzi had or exercised such authority. Gurabo Lace Mills, Inc., 249 NLRB 658 (1980); N.L.R.B. v. Security Guard Service, Inc., 384 F.2d 143, 149 (5th Cir. 1967).

Although Mazzi testified he occasionally assigned work, he explained the limited circumstances under which he made such assignments when employees were assigned to assist Adams and himself. He acknowledged employees sometimes expressed complaints or asked him questions about the work, work problems and employee concerns, and he would answer their questions or express his opinion in response to their complaints. It was not established by the evidence that Mazzi resolved any employee grievances or monitored

their work performance on behalf of management. In fact, the employees were not assigned in his department and none of them were permanently assigned to him for directions. As counsel for the General Counsel argues, and I agree, it appears normal that employees would consult with an employee whose tenured seniority greatly exceeded their own. As counsel for the General Counsel also points out, the Board has held that a more experienced employee who answers questions for junior employees and gives them some advice on job performance does not necessarily mean that he directs their work. Also, where instructions and orders from a senior employee involve only routine matters, such senior employee is a non-supervisory leadman. Salinas Mfg. Corporation, 211 NLRB 573, 574 (1974). Additionally, where such experienced employee occasionally reassigns work from one employee to another because of the inability of junior employees to perform the work, the Board has held that such employee is not a supervisor. Vapor Corporation, 242 NLRB 776, 780-83 (1979).

Based also upon the foregoing evidence and legal authority, I conclude and find that John Mazzi was not a supervisor within the meaning of the Act, but an employee who also signed a union authorization card on June 16. Respondent's argument is not substantiated by the evidence of record. Since Mazzi was an employee, his card as well as the employees who signed cards in his presence, should, and will be counted in determining whether the Union enjoyed majority support of the employees on June 18 through 21, when the Union made its request upon management for recognition.

Based upon the foregoing credited evidence I also conclude and find that on June 3, and more particularly, June 16 and 17, 1982, Respondent's employees engaged in an organizing campaign to unionize Respondent's plant. I further conclude and find that counsel for the General Counsel presented authorization cards signed by 20 of Respondent's 32 employees. Respondent challenged 8 of the 20 signed cards for authenticity or validity. Notwithstanding, having found the challenged authorization

card of Ron Shepherd invalid for purposes of determining the Union's majority status on June 17-21, I nevertheless find valid the 7 challenged authorization cards of Miguel Velez, Gail Ocasio, Eliseo Jimenez, Susan Johnson, John Mazzi, Clotilde Irezarry and Carmen Rodriguez. The Union therefore had validly signed authorization cards from 19 of Respondent's 32 employees on June 17-21, 1982. Consequently, since 19 signatures (signed cards) constituted a majority, 3 more than half of Respondent's 32 employees on June 17-21, I find that a majority of Respondent's employees designated the Union their collective bargaining representative on June 17, 1982.

The Supervisory Status of Tony Mangine

Anthony Mangine was plant manager of Respondent at all times material herein (February-September 13, 1982). Respondent's president, Harold Limpert testified that Mangine was responsible for plant production, and that he had the authority to hire and fire employees. President Limpert's testimony is consistent with the testimony of employees

Robert Milana and Susan Johnson, who undisputedly testified that Mangine hired them. With such clear uncontroverted and probative evidence of supervisory status of Mangine, the conclusion is inevitable that Mangine's function satisfies the requirements for supervisory status set forth in Section 2(11) of the Act.

C. Respondent's Knowledge of the Employees' Organizing Activities and It's Reactions thereto

Pauline Pruitt undisputedly testified on cross-examination that on June 17, Michael DiMatteo, who had refused to sign an authorization card, told her he went into the office and told Managers Mangine and Giordano, that the Employees were trying to organize a union. 2/

2/ Not only is Pruitt's testimony in this regard not disputed by Mangine, but I was persuaded by her emeanor that she was testifying truthfully. Moreover, since her testimony in this regard is supported by other credited testimony and circumstantial evidence in the record, I credit her testimony of what she said DeMatteo told her and I discredit Giordano's denial that she knew about the employees union activity.

About 4:00 or 4:30 p.m. on the afternoon of June 17, the Company called a meeting of all employees which was held in the Cherry department. Present for the Company were General Manager Pearl Giordano and Plant Manager Tony Mangine. A composite of the essentially consistent and undisputed testimony of the witnesses of both parties extablished that Giordano told the employees, that "due to lack of sales, there would be a cutback in the workweek to a 4-day week, possibly a 3-day week, but she would try to avoid any layoffs"; that the employees and members of management at Limpert Brothers were like one family, and that she knew how difficult it was to find a job, so there would be no layoffs. This was the first time the employees had ever been notified about such a reduction in work hours or lack of sales, reflecting financial problems.

On the same afternoon, June 17, truck driver Joseph DeMaio returned from making deliveries about 4:30 p.m. while the meeting with employees was in progress. After the meeting he went to the office of Plant Manager Tony Mangine to turn in his delivery receipts

for the days work. He testified without dispute that Mangine asked him "how come your didn't tell me?" DeMaio said he looked at Mangine and asked, "tell you what?" and Mangine failing to respond, DeMaio walked out of the office. Several minutes later DeMaio returned to Mangine's office. Mangine then said to him, the reason for the 4-day workweek is because the employees are organizing a union and the Company learned about it and is reducing the work days. Mangine asked him if he wanted to sign a union card and he told Mangine he had to give it some thought and would let him know. 3/

About 11:00 or 11:30 a.m. on the next day, Friday, June 18, 1982 the Company called

3/ I credit DeMaio's testimony not only because I was persuaded by his demeanor that he was testifying truthfully, but also because his account is relatively consistent with his account of a similar conversation he had with Respondent's President-owner, Harold Limpert on June 19, and also with the testimonial account of conversations John Mazzi and Pauline Pruitt held with Plant Manager Mangine at the Flea Market on June 19, infra, as well as with all of the credited evidence of record. DeMaio's

testimony in this regard is also undisputed because Tony Mangine, who has been replaced as plant manager by Tony Campanella, did not appear and testify in this proceeding and no reasonable explanation was offered for his non-appearance. Respondent did not establish that it could notproduce the appearance of Mr. Mangine, or if not, why not. Respondent has established that "the missing witness rule" is not applicable here. Avon Convalescent Center, Inc., 219 NLRB 1210 (1965).

a meeting of all the employees at which present for the Company were: President Howard Limpert, General Manager Pearl Giordano and Plant Manager Tony Mangine. According to a composite of the essentially consistent testimony of witnesses for both parties, Mr. Limpert said due to lack of sales and the general state of the economy, he would have to layoff some employees; that the Company was in debt and bank creditors were on him. Giordano and Mangine proceeded to distribute the layoff notices and checks to employees. Since the payroll period ended on June 17, the employees were given an additional check for 4 hours on June 18. Forklift operator Leonard Graff asked Mr. Limpert were they being laid off or

fired, but Mr. Limpert did not respond. He repeated his question and Mr. Limpert said they were terminated and he offered to show Graff the Company's debts but Graff declined the offer. Mr. Limpert then went upstairs and got the Company's books but Graff would not look at them. Giordano also replied to inquiring employee Pruitt about her employment status by informing her that they were terminated. Donna Barriento, Laverne Jackson, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker and Gail Ocasio.

John Mazzi has been in Respondent's employ as a maintenance mechanic and boiler engineer since June 19, 1954. He maintained the machines for production. He signed a union authorization card on June 16 and distributed cards in the plant and solicited signatures on June 17. Mazzi did not report to work on June 18 but called in to advise he had a doctor's appointment. Giordano told him she would inform his supervisor, Mangine. When Mazzi returned home from the doctor around noon, Giordano called

him at home and advised that he need not report to work. She asked him to remain home because she and Mangine would like to come to his house to see him. When they arrived at his home, Giordano informed Mazzi that the Company's accountants had instructed the Company to cut the work force in half and he happened to be one of those employees terminated. She apologized for having to do this and give him his final check. This was the first time Mazzi said he had been laid off in his 28 years with the Company. He could recall only one period (Dec.-Feb.) 6 years ago when a few people were laid off, but never during the summer months.

Joseph DeMaio had been employed by the Respondent under the supervision of Tony Mangine from 1976 to September 1982. On Friday, June 18, Supervisor Mangine and General Manager Giordano told truckdriver and part-time production worker, Joseph DeMaio, the truck would not be going out because Respondent needed him in the plant and the products would be delivered by carrier. Thereafter, DeMaio worked mostly in the Cherry department dumping and

processing cherries, which function was previously performed by employees who were laid off. Four other ladies (Rita, Loria, Malyn and Jody, a part-time worker) from the clerical staff joined DeMaio in performing the same work. A few other employees including Plant Manager Mangine were assigned to assist them. DeMaio had never seen these employees work cherries before, although cherry sorter Donna Barriento testified that this did occur infrequently.

DeMaio further testified that on the day after the layoffs, Saturday, June 19, while in Mr. Limpert's office with Mangine, the following conversation ensued:

> Well, in the beginning Mr. Limpert asked me how come I didn't know anything about the Union, which is what he was talking about. And Tony Mangine stood up and told him that I didn't know anything about it because he had questioned me about it already. And Mr. Limpert proceeded to say well, he would close his doors before he brought a union into his company, for

good. Mr. Limpert denied he said he would close his doors before his plant was unionized. 4/

Also on Saturday, June 19, employee John Mazzi testified that he saw Plant Manager Mangine at the Flea Market where Mangine and Mazzi both worked. Mazzi said he asked Mangine why were they laid off and Mangine said "to his knowledge management knew of the union activity... and that was the reason they were all discharged." Mangine also said the Company was in bad shape

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4/ Again, I credit the testimony of DeMaio over that of management because I was persuaded by his demeanor that he was telling the truth, and because his testimony is consistent with his prior conversation with Manager Mangine in the office on June 17, as well as the testimony of Pauline Pruitt and John Mazzi's conversations with Mangine at the Flea Market on June 19, infra, as well as with the credited evidence of Respondent's actions taken on June 17 and 18. I was also persuaded by the demeanor of president Limpert that his denial of the statements attributed to him by Demaio was not truthful.

production - wise because the work was accumulating and there was no one to produce, since most production workers were laid off. Pauline Pruitt also saw and talked with Mangine at the Flea Market on June 19, and Mangine told her the same things he told Mazzi. Mangine did not appear or testify in this proceeding to admit or deny these conversations.

General Manager Pearl Giordano testified she first learned about the employees union organizing activities on June 18, when she received a telephone call from Western Union. The record shows that at 2:15 p.m. on June 18, Western Union received an order for the transmission of the following message (Respondent's Exhibit 24) from the Union to Respondent:

> THIS IS A CONFIRMATION COPY OF A TELEGRAM ADDRESSED TO YOU. THIS OFFICE IS COUNSEL TO UFCW LOCAL 56, IT HAS COME TO OUR ATTENTION THAT YOU HAVE REDUCED THE WORK WEEK AND TERMINATED A NUMBER OF EMPLOYEES AS A RESULT OF THEIR UNION ACTIVITIES. PLEASE BE ADVISED THAT

THE FEDERAL LABOR LAWS PERMIT EMPLOYEES TO ENGAGE IN UNION ACTIVITIES WITHOUT FEAR OF REPRISAL OR RETALIATION. BE ASSURED THAT WE WILL TAKE ALL STEPS NECESSARY TO INSURE YOUR COMPLIANCE WITH THE LAW. 5/

In a letter dated June 18, 1982 (General Counsel's Exhibit 3), mailed on June 19 and received by Respondent Monday, June 21, 1982, the Union apprised Respondent that a majority of its employees had designated the Union as their collective bargaining representative and the Union thereupon requested recognition of Respondent and demanded negotiations.

In a letter dated June 22, 1982 (General Counsel's Exhibit 4), legal counsel for the Respondent advised the Union that

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5/ I do not credit Giordano's testimony in this regard because it conflicts with the overshelming weight of the credited evidence to the contrary, that Respondent had knowledge of the organizing activity of its employees on June 17.

Respondent had a good faith doubt that the Union represented an informed and uncoerced majority of its employees in an appropriate collective bargaining unit, and for this reason the Union's request for recognition and demand was rejected. The letter also advised that the Union's offer to establish proof of majority status was declined and that a secret ballot election conducted by the Board was the best way to ascertain whether the Union represented the majority of employees.

The 12 employees laid off on June 18 were Pauline Pruitt, Laverne Jackson, Donna Barriento, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker, Gail Ocasio, John Mazzi and Susan Johnson, all of whom had signed a union authorization card on June 16 and 17, 1982. The terminations reduced the Respondent's work force from 32 to 20 production and maintenance employees.

In response to an August newspaper advertisement for a boilermaker, Raymond Fitzgibbon, a 65 year old veteran of 30

years in the Navy wrote a letter to the Respondent expressing his interest in the position. He received a telephone call from Mr. Limpert and was interviewed and hired a week later by Mr. Limpert as a boiler operator. He worked 42, 48, 50 and 54 hours per week at a rate of $4.25 per hour. Respondent hired Margaret DiMatteo on July 26 to work in the labeling department.

Based upon the foregoing credited evidence, I find that on June 17, Michael DiMatteo, who refused to sign an authorization card, told Pauline Pruitt he had told Managers Mangine and Giordano that the employees were trying to organize a union; that when Mr. Limpert asked DeMaio on June 19, how come he did not know about the Union and Manager Mangine stood up and said, DeMaio did not know anything about it because he (Mangine) had already questioned DeMaio about it; that it may reasonably be inferred from such acknowledgement by Mangine, that Mangine could only have been referring to his June 17 inquiry of DeMaio about the organizing activities of the employees. Mangine's voluntary response to Mr. Limpert's

question clearly demonstrates the latter conclusion, which is further supported by other unlawful conduct of Respondent, infra.

I further conclude and find that during the June 19 conversation with DeMaio, Mr. Limpert did in fact say he would close his doors for good, before he would allow his plant to become unionized; that the latter statement by Mr. Limpert demonstrated union animus, as well as a threat, restraining and coercing employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1) of the Act; that also on June 19, Mangine told Mazzi and Pruitt the reason they, and other employees, were laid off was because the Company learned about the employees' union activities; and that when all of the statements by Manager Mangine are considered in conjunction with the undenied statement of Michael DiMatteo to Pauline Pruitt, that he told management about the employees' organizing activities, the fact of the small size of the plant (32 employees), the precipitous layoff of employees on June 18, the evidence more than amply demonstrates that Respondent

had knowledge of the employees' organizing activities on June 17 and 18, 1982.

Analysis and Conclusions

Respondent learned about the union's organizing activities of its employees during the work day of June 17. Between 4 and 4:30 p.m. on that very afternoon, Respondent called a meeting of its maintenance and production employees, and without any prior notice to the employees, for the first time announced that it was having financial problems and would have to reduce the number of work days from 5 to 4, or 4 to 3 a week, in order to avoid layoffs. After the meeting Plant Manager Tony Mangine asked employee Joseph DeMaio "how come you didn't tell me," (referring to the Union), and DeMaio asked, "tell you what," and walked away. Several minutes later Mangine asked DeMaio did he "want to sign a union card," and DeMaio said he did not know but he would have to think about it. Since Mangine was plant manager, he was a high ranking member of management and his questions to DeMaio about his, as well as his fellow employees'

union interests, tended to have a restraining and coercive affect upon the exercise of employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

Prior to noon on the next day, Friday, June 18, Respondent called a meeting of the employees and announced the immediate and permanent layoff of 10 employees as a necessary reduction in its 32 employees work force, occasioned by the loss of sales and adversely affected credit of the company. Later that afternoon Respondent laid off two more employees, allegedly for the same reasons. All twelve of the employees laid off on June 18 had signed a union authorization card only 1 or 2 days earlier (June 16 or 17). Respondent contends the layoffs were based upon economic considerations, and in some cases, for cause. The Charging Party and the General Counsel maintain that the layoffs were motivated by the union activity of the employees and therefore, were discriminatory and in violation of Section 8(a)(1) and (3) of the Act.

Preliminary to determining whether an employer has discriminated against employees in violation of Section 8(a)(3) or Section 8(a)(1) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected (organizing) activity of the employees, was a "motivating factor" in the employer's decision to layoff or discharge them. Having established such a showing, the burden then shifts to the employer to demonstrate that the layoffs or discharges would have occurred whether or not the employees were engaged in organizing or other protected conduct. Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083, 1089 (1980), enf'd 662 F.2d 899 (1st Cir. 1981).

A prima facie case is presented by the General Counsel when the evidence shows:

1. Employees were engaged in activity in support of a union.
2. The employer knew of that activity.
3. The employer has manifested hostility

towards the employees for supporting of the Union. Hillside Bus Corporation, 262 NLRB NO. 152, at 1 slip op. 3 (1982); Kenco Plastics Company, Inc., 260 NLRB 1420 (1982).

As previously found upon the evidence under topic B, supra, Respondent's employees were engaged in a union organizing campaign on June 3, 16 and 17, 1982.

Also, as previously found upon the evidence under topic C, supra, knowledge of the employees organizing activity was acquired by Respondent on June 17, when Michael DiMatteo told Managers Giordano and Mangine on June 17, that the employees were organizing a union; and that on June 19, Plant Manager Mangine told employees Mazzi and Pruitt, Respondent laid off the employees on June 18 because it learned prior to the layoff, that the employees were organizing a union. Additionally, knowledge of the employees' organizing activity may be reasonably inferred to Respondent from the relatively small size

of its plant, having a work force of only 32 employees amongst whom a union card solicitation campaign was carried on by employees Pruitt, Mazzi and others on June 17, as well as from Manager Giordano's characterization of the work force as a family. In such a setting, the intimacy of the small number of employees makes it difficult to conceive how any form of concerted or group activity could be kept secret. Self-Cycle and Marine Distributor Co., Inc., 237 NLRB 75, 81 (1978); Weise Plow Welding Co., Inc., 123 NLRB 666, 668 (1959).

Both hostility for, and knowledge of, the employees' organizing activity may also be reasonably inferred to Respondent from the fact that all 12 of the employees laid off on June 18 had signed a union authorization card on June 16 or 17. To attribute their special selection fro layoff to coincidence would be an unrealistic stretch of the imagination which common experience discredits. The U.S. Court of Appeals stated in N.L.R.B. v. Midwest Hanger Co., 474 F.2d 1155, 1157 (8th Cir. 1965):

> Of the 18 discharged employees, all but one signed authorization cards. This presented a telling percentage of 95% discharge of Union adherents while the percentage of Union employees in the plant as a whole was 70%. This on its face would indicate a discriminatory discharge violative of the Act.

Additional evidence of Respondent's hostility or animus for the organizing activity of its employees is manifested by the precipitous nature of the layoffs, in the absence of any advance warning to the employees. Here, the Respondent learned about the employees' organizing effort on June 17. Between 4 and 4:30 p.m. on that very afternoon (June 17), Respondent called a meeting of the employees and for the first time, talked about reducing the work days to avoid layoffs. On the next day (June 18), Respondent proceeded to layoff the 12 employees. It is also particularly noted that the layoffs occurred during the month of June, the month in which Respondent's accountant (Mr. Capaldi) said was the highest

peak of the spring-summer seasonal business of the Respondent. Such layoffs normally do not occur during this busy season (spring and summer). Under such circumstances, I was persuaded that Respondent's layoff of the employees was motivated by its hostility or animus for the organizing activities of the employees, all of whom had signed union authorization cards on June 16 or 17. Kenco Plastics Company, Inc., supra; Dutch Boy, Inc., 262 NLRB NO. 1 slip op. at 3 (1982); Bedford Farms Cooperative, 259 NLRB 1226, 1227 (1982).

Additional post-discharge evidence of Respondent's animus also occurred on Saturday June 19, when Mr. Howard Limert, president of Respondent, interrogated Joseph DeMaio about his, and fellow employees' union interest and activities, by asking him "how come you didn't know about the Union." DeMaio was spared making a response to this question by the intervention of Manager Mangine, who told Mr. Limpert, DeMaio did not know anything about it because he (Mangine) had already asked DeMaio about it. Mr. Limpert then stated he would close

his doors for good, before he permitted unionization of his plant.

As president of Respondent, Mr. Limpert is the highest ranking managerial official of the Company. Hence his interrogation about the Union and his closing the plant statement to an employee would tend to have a chilling and apprehensive affect upon the exercise of protected rights of employees. Since the plant closing statement was not accompanied by objective facts supporting such a result, it was not a reasonable business prediction. Rather, it was a threat of retaliation by Mr. Limpert for employees engaging in organizing activity. Such a threat was based upon coercion and therefore was not protected as free speech under the First Amendment. Gissel Packing, 395 U.S. 575, 618-619. Such threatening conduct on the part of the Respondent (Mr. Limpert) constituted a violation of Section 8(a)(1) of the Act. See also; General Electric Company, 246 NLRB 1103, 1105 (1979); P.B. and S. Chemical Company, 224 NLRB 1, 2 (1976).

As counsel for the General Counsel argue in their brief, Respondent's layoff of the organizing employees was so abrupt, it occurred on the day following the end of the payroll period, necessitating the issuance of an extra pay check to the laid off employees. Such hasty action by Respondent is not indicative of a plan to lay off, which had been contemplated several months and actually decided as early as May 26, as the Respondent contends.

In view of the foregoing findings, reasons and authority, I further find that General Counsel has discharged its burden of establishing a prima facie case in accordance with Board law. Hillside Bus Corporation, supra; Kenco Plastics Company, supra. Thus, the burden of going forward with the evidence now shifts to the Respondent, to establish that the 12 employees laid off on June 18 would have been laid off at that time, whether or not Respondent's employees were engaged in a campaign to organize the Union.

Respondent's Economic Defence for Reducing its Work Force on June 18

Respondent denies that its June 18 layoffs were related to the organizing activities of its employees. It contends and presented evidence that the employees laid off on June 18 were laid off for economic reasons, and in a few cases, also for cause. In support of its position, Respondent established that its distinguished and highly qualified and experienced certified public accountant, Mr. Bernard W. Capaldi, President of Capaldi, Schalick & Reynolds, a certified public accounting firm, has rendered accounting and management services to Respondent since 1951. In such capacity, Mr. Capaldi prepares and furnishes semi-annual fiscal statements for the Respondent. The Respondent's fiscal year ends on October 31.

In January 1981, Mr. Capaldi submitted to Respondent's President, Harold Limpert, the financial report for the fiscal year ending October 31. The report reflected

a net loss of $155,825.36, with an after tax loss of $95,975.72. Mr. Capaldi testified he followed-up his report with a January telephone call to Mr. Limpert, during which time he advised that things were very, very serious, that Respondent must reduce inventory, and he suggested they meet after the tax season to review the situation. Mr. Capaldi takes his annual vacation after the tax season ends on April 15. In his January conversation with Mr. Limpert, he said he advised Mr. Limpert, "that he had to reduce inventory, and the only way he could reduce inventory, was to reduce production, because productive labor goes into inventory. It is part of inventory. The more productive labor you have the more material you need... the more sugar is used, the cherries are used, the more strawberries are used." He further advised that Respondent stop producing, "limit production, keep selling, and that would in turn reduce the inventory." Mr. Limpert asked were there any alternatives and he said, except for increasing sales and profits, which are not always possible. Mr. Limpert then told

him he would make a general analysis to determine whether the Company should convert the plant to a partial workweek or layoff employees.

In response to Mr. Capaldi's advice to Mr. Limpert, Pearl Giordano, general manager of the Respondent since 1976, testified that she sent out a memo to supervisory staff in March 1982 concerning production (Respondent's Exhibit 16). She sent another memo to Plant Manager Mangine (Respondent's Exhibit 17) and a memo to Mr. Capaldi (Respondent's Exhibit 18) concerning efforts to reduce inventory. She identified Respondent's Exhibit 19, a notice of late bills dated 2/9/82 and Respondent's Exhibit 20, a notice of denial of further credit for sugar. The latter documents were admitted to establish the delinquent manner in which Respondent was paying its bills and how its credit was being affected.

When Mr. Capaldi returned from vacation he met with Mr. Limpert, General Manager Giordano, and Plant Manager Mangine on May

26, 1982. During the meeting, Mr. Capaldi said he again advised the Company that it was mandatory that his prior advice to the Company (including a reduction in the work force) be implemented if the business was to survive. Mr. Capaldi followed up his advice to Respondent in a letter dated June 8, 1982.

Mr. Limpert testified Respondent had a loss of $154,000 for the year ending October 31, 1982. Prior thereto, Respondent had a loss of $4,000 one year and a loss of $1,000 another year. He decided to cut staff when he received the letter of June 8, 1982 from his CPA, Mr. Capaldi. He said he knew in late January from his conversation with Mr. Capaldi that he had to reduce the work force as Mr. Capaldi advised, but he thought that business would turn around in early 82 or in the spring of 82. During the meeting of May 26, 1982, Mr. Capaldi was very emphatic that there had to be a reduction in force. After that meeting he met with Giordano and Mangine and told them to comply with the advice of Mr. Capaldi, including reducing the work force.

Subsequently, General Manager Giordano testified she and Mangine made the decision on June 3 or 4, 1982 as to who was going to be laid off. The employees were not notified and actually laid off until June 18, because she was instructed to get the inventory down and generate some cash by getting out the orders on hand. On June 18, she said she laid off Donna Barriento, Laverne Jackson, Gail Ocasio, Carlos Gonzalez, Carmen Rodriguez, Lewis Smith, Sharon Parker, Pauline Pruitt, and Lennie Graff. In deciding who would be laid off she said they considered (1) contribution to the Company, (2) attitude, (3) work habits, (4) attendance, (5) timeliness, (6) use of profane language, and (7) most versatile and productive. Giordano said although she knew on June 17 there would be layoffs, she did not so advise the employees because Mr. Limpert was in New York, so she waited until his return the next day (June 18).

Coonclusions on Respondent's Defenses

It is particularly noted that Respondent's evidence does not coincide

with its business conduct, with respect to the size and number of hours worked by its work force. Respondent produced numerous documents reflecting its business operations in an effort to establish that Respondent was sustaining significant losses in 1980, late 1981 and early 1982, which it contends was its reason for laying off 12 employees on June 18. Its records do establish the losses about which President Limpert and Mr. Capaldi testified. The records also show that before the June 18 layoffs, Respondent had 32 employees and that Respondent started hiring new employees a week later, on June 27. By August 4, Respondent had increased its work force to 30 employees, and by August 7, to 36 employees. Moreover, since September the work force remained at 30 employees until Respondent's normal and expected seasonal decline in business in November.

The records further show that the amount of hours worked during this period (September-November) correlated with the increase in the work force. Correspondingly, the payroll increase correlates with the

increase with the work force and hours worked. Within 2 months after the layoffs of June 18, the records show that the work force, payroll and number of hours worked by production employees per week, were essentially equal to what they were prior to the June 18 layoffs, as shown in General Counsel's analysis (Appendix A, B, C, and E). In its post-hearing brief to the undersigned, Respondent does not cite any analysis of its record evidence which demonstrates how Respondent reduced its inventory by reducing its work force, except for about 1 week. Thereafter, Respondent commenced hiring production and maintenance employees without recalling any of the employees laid off on June 18 or thereafter. Certainly Respondent did not implement such a mass layoff of employees for one, or a few weeks, to relieve its financial problems. In fact Respondent's evidence of its contemplated layoff is largely self-servicing, since no one outside of management knew anything about a possible layoff before June 17. Nor was there any documentary evidence post-stamped to verify an earlier date.

Respondent's General Manager Giordano testified that the new employees hired between May 26 and June 18 were hired to facilitate the reduction in sales orders so that the layoffs could be effectuated. However this explanation is not reconcilable with the fact that Respondent (Mangine) hired Robert Milana on June 3, Susan Johnson on June 7, and Diane Johnson on June 14. When Susan Johnson was hired she was told by Respondent (Mangine) that she was hired as a full time employee. I find it difficult to conceive that an employer contemplating multiple layoffs in the very near future, would engage in hiring employees on a full time basis after it had already made a definite decision on May 26 and more definitively on June 3 or 4, to make a substantial reduction in its work force.

It is noted that neither Milana, nor employee Diane Johnson who was hired on June 14, were terminated on June 18 along with more senior employees, all of whom had signed a card for the Union. These and other recent hirees by Respondent certainly indicate that Respondent was not

preparing for such a huge layoff of employees, and Respondent's layoff-conduct in this regard is inconsistent with its theory of reducing the work force. Instead, such conduct by the Respondent clearly shows that Respondent did not definitely decide to reduce the size of the work force until after it learned about the Union's organizing campaign on June 17. The Respondent's conduct clearly demonstrates that the organization activity of its employees was the motivating cause for its reduction in the work force on June 18, and not its financial problems. Wright Line, supra, N.L.R.B. v. Transportation Management, 113 LLRM 2857 (1983). Hence, it is clear that Respondent's contended economic defense is in large part a pretext, contrived by the Respondent to camouflage its otherwise unlawful termination of employees in order to undermine efforts of employees to unionize the plant.

Respondent's (Giordano) June 17 announcement to its employees, only a few hours after it learned of the employees' organizing activity, that there would be a reduction in the workweek from 5 to 4,

or 4 to 3 days a week, was obviously motivated by the same reason for which the Respondent terminated 12 employees on June 18: The union organizing activity of its employees. Respondent having failed to discharge its burden of showing that the reduction in work force, or the particular employees laid off, would have occurred even in the absence of the employees' union organizing activity, is hereby found to have announced such reduction in the workweek because its employees were organizing the Union. Such conduct by the Respondent was also discriminatory and violative of Section 8(a)(1) and (3) of the Act. Barnes and Noble Book Stors, 233 NLRB 1326, 1337 (1977); Thomas Metzger d/b/a Farmers Grain Elevator, 226 NLRB 564, 573 (1976).

John Mazzi: Was Allegedly Terminated Also for Cause

During this proceeding Respondent contended it terminated John Mazzi because of his work attitude and because cook Licaretz threatened to quit if Mazzi remained in

Respondent's employ. It is particularly noted however, that the reasons now advanced by Respondent for the discharge of Mazzi are different from the reason both Giordano and Mazzi testified Respondent gave him for his termination on June 18. At that time, the credited evidence of record shows that Giordano told Mazzi the Company's accountant had advised the Company to reduce the work force and he (Mazzi) happened to be one of the employees Respondent had to lay off. With respect to head cook Licaretz, the uncontroverted evidence established that Mazzi and Licaretz occasionally got into arguments over the past 8 or 9 months, but the arguments became more frequent in about April 1982. The extent to which Licaretz and Mazzi worked together occurred whenever Licaretz had the product ready to be packed out and pulled away. It was Mazzi's responsibility to pull the product away when Licaretz advised him the product was ready to be pulled away.

According to the account of Licaretz, the source of the arguments frequently arose from Mazzi's failure to timely pull out

the product when he (Licaretz) had it ready and so advised Mazzi. On or about Monday, June 14, 1982, an argument arose out of the same set of circumstances between Licaretz and Mazzi. Since management personnel were not present on that day, Licaretz said he waited until the next day, Tuesday, June 15, when he reported the incident to Giordano. He told Giordano he "could not tolerate it any longer, it was too much, too many arguments. It was too hard to get the product out and we were hurting for product and I couldn't keep the ball rolling all by myself, so I needed more cooperation," and "that unless this was straightened out, I had to leave because I had ulcers and I couln't make them any worse." He told her if the problem was not resolved, he would have to quit because his health could not endure it.

In her testimony Giordano acknowledged that Licaretz came to her on Tuesday, June 15, and told her he could not take it any lonber, that he was under a doctor's care, and that he would have to quit. However,

it is noted that Giordano's version includes an ultimatum by Licaretz "that it would have to be either me or Mazzi," which Licaretz did not include in his testimony on direct or cross-examination. Consequently, I do not credit Giordano that Licaretz gave her such an ultimatum. I do not credit Giordano's testimony in this regard for several reasons. Giordano's early testimony about the conflict between John Mazzi, an employee of nearly 28 years, and Charlie Licaretz, an employee of 15 years, said it was due essentially to Mazzi's spending too much time in the labeling department with Pauline Pruitt. She further stated that when employees needed Mazzi, the men would say Mazzi is in there mooning over Pruitt. Giordano's explanation of her problem with Mazzi was somewhat vague on direct and cross-examination. On further examination, she stated Mazzi had an obstinate personality which Mazzi acknowledged to her he had. On March 27, 1981, Giordano said she sent Mazzi home for 1 week because of his attitude towards management and she sent the following message to Mr. Mangine.

Message: I have just sent John

home for the last time. He has 1 week to think about his future with Limpert Brothers. He must change his attitude and work habits as well as, make an effort to get along with his workers. (Respondent's Exhibit 23).

Reply: Please attach this to his payroll sheet.

The evidence does not show that Mazzi was ever given a copy of the above message.

It is also noted that according to Giordano's testimony, Licaretz reported the incident of his altercation with Mazzi on June 15, but she did not speak to Mazzi about the incident any time before, nor including the time she visited Mazzi at his home and terminated his employment for the stated reason: The accountant has advised the Company to reduce the work force and you happen to be one of those laid off. When Giordano was asked by the bench did she hold a conference with Mazzi and/or Licaretz regarding the altercation reported to her by Licaretz, Giordano said "no."

Finally, on redirect examination Giordano testified that the primary cause of the conflict between Licaretz and Mazzi was the result of a romantic involvement of Mazzi and Licaretz with Pauline Pruitt. Her testimony indicated Mazzi was in better standing in the relationship with Pruitt than Licaretz, and that she had spoken with both Licaretz and Mazzi about their involvement on prior occasions. The record does not show that either Mazzi or Licaretz was ever given any warning or that Manager Giordano dealt with the problem as though it was of any significant priority.

Although Giordano stated she had decided to lay off Mazzi when she received Licaretz's report about the incident on Tuesday, June 15, it is clear that the record does not contain any evidence which indicates that Giordano manifested any such intention. On the contrary, all of the credited evidence of record clearly indicates that Giordano terminated the employment of Mazzi because of his and other employees' support for the Union. It is therefore obvious that

Giordano now attaches exaggerated significance to the long-time conflict between Mazzi and Licaretz as a pretext to camouflage Respondent's unlawful discharge of him. It is particularly noted that Licaretz only requested Giordano to resolve the problem. He did not suggest how she should do it. However, if he did give Giordano an ultimatum, either himself or Mazzi, it is strange Giordano did not say anything to Mazzi about it between June 15 and 18. I am persuaded this latently advanced reason for Mazzi's layoff is pretextual.

Respondent Also Contends It Laid Off Other Employees for Cause

As a part of Respondent's defense of layoff for cause, Keith Steever, employed off-and-on by Respondent for 3 years, testified he was last hired to head the Cherry department, but he left because he heard there was going to be cuts and because he had personal problems with Plant Manager Mangine. Nevertheless, he stated that while serving as head of the Cherry department

he noted employees reporting to work late from January to June 1982. He said he discussed attendance and timeliness with employees in group meetings and in individual meetings. In a group meeting in May, he stated that he spoke with Laverne Jackson, Donna Barriento and Carmen Rodriguez (all three of whom signed a union card) about coming in late practically every day, being absent frequently, and causing a shortage in the working crew. He met with General Manager Giordano in May about the problem of attendance and timeliness, during which time he also spoke to her about the use of profane language in the plant. Thereafter, he told the employees that all lateness, absences and foul language had to cease or the Company would make some changes. He said he spoke personally with Rodriguez about her attendance but he acknoledged he did not issue any written warnings because the Company did not have a policy on warnings. Nor did he describe the specific nature of his talk with Rodriguez.

It is particularly noted that Respondent did not issue any written warnings to any

of the employees about attendance, timeliness, or use of profanity in the plant. In fact witness Steever acknowledged that attendance and timeliness of the employees improved after he met and spoke with the employees about the problem. Thereafter, he said the use of profanity subsided. The evidence does not establish that Respondent attributed any significant priority to these problems until now. None of the eimployees laid off on June 18 were told at the time of their layoff, that they were being laid off because of attendance, untimeliness or use of profanity. Instead, they were told they were being terminated because of sales and financial losses sustained by Respondent. Hence, it is again obvious that these largely self-serving and latently advanced reasons by the Respondent for the lay off of 12 employees on June 18, are pretextual and do not mitigate any of the substantial evidence that all 12 of the employees were laid off because the employees were organizing the Union.

Respondent Refused to Allo Fitzgibbon, DeMaio and DiMatteo to Return to Work Because they Refused to Cross the Picket Line

Union representative Matway contacted some of the laid off employees in early September and urged them to picket Respondent for the June 18 termination of employees because they organized the Union. The picketing commenced on September 20. Matway asked some of the currently working employees to join them on the picket line. The working employees did not join them but some of them refused to cross the picket line. The terminated employees picketing the Respondent were Jackson, Pruitt, Ocasio, Barriento and Mazzi. Joseph DeMaio was one of the employees who refused to cross the picket line or join in the picketing, but he stayed outside the plant several hours every morning. On the first day of the strike, Mangine had been replaced by Tony Campanella as plant manager. Campanella called DeMaio to his office and asked him if he was going to cross the picket line and come to work.

DeMaio told him he would not cross the picket line but would return to work as soon as the pickets left. Ten minutes later, Campanella called DeMaio and asked him for the keys to the truck.

When boilerman Fitzgibbon reported to work on September 20, there was a picket line with signs which read "unfair labor practices," bearing Local 56. Having previously been a member of a union while employed by Amstar Corporation, and after talking to truckdriver DeMaio who told Fitzgibbon the employees were on strike because they were terminated for joining the Union, Fitzgibbon said he refused to cross the picket line and returned home about 11:30 a.m.

On that evening Fitzgibbon received a call from Mr. Limpert who asked him why he did not light the boilers because without steam the plant could not operate. Fitzgibbon testified he told Limpert he did not feel safe in there, that he ad a new truck in the parking lot and he wanted it to be there when he came out, so he was not going to

cross the picket line. Mr. Limpert suggested the Company send someone to bring him in and take him home evenings, but Fitzgibbon said "No way." He advised Mr. Limpert he would return to work when the picket line was down. On the next day, Fitzgibbon stood outside the plant but eventually decided to go in to get some personal belongings. When he went in, Mangine and Campanella asked him to light the boilers because they had no steam and he said "No way."

Fitzgibbon went to the plant on the next morning and stood outside. Mr. Limpert approached him and asked him what was he doing and Fitzgibbon said he was just watching things. Mr. Limpert told him to get out of there; that he was disappointed in him for not crossing the picket line, and that he thought he (Fitzgibbon) was one of the family.

Margaret DiMatteo did not report to work September 20 and 21 because of the illness of her daughter. However she informed management on September 23 and 24 that she would not cross the picket line. Manager

Campanella asked her why, and DiMatteo said, "I feared for myself and my vehicle that I drove to work and he told me they had a guard there. I don't know what kind." She also said "My father was a truckdriver...and I had grown up respecting that."

On Monday, September 27, Fitzgibbon went to pick up his paycheck between 4 and 4:30 p.m. At about 5 p.m. Mr. Limpert asked him to come into his office where Managers Mangine and Campanella were present. Fitzgibbon said Mr. Limpert was raving and beating on the desk, telling him he had a good chance to lose his engineering license and that he never should have left the boilerhouse. Fitzgibbon said he reminded Mr. Limpert he had shut down the boilers 30 hours before the strike; that he had not returned to the plant; and that he had not walked out of the boilerhouse. He said Mr. Limpert asked him why was he refusing to cross the picket line, who was he talking to on the picket line, and what were they talking about. He told Mr. Limpert he did not want to come into the plant because

he felt intimidated. Mr. Limpert asked who told him not to enter the plant and Fitzgibbon told him, "No one." However, in the written statement (Respondent's Exhibit 7) signed by Fitzgibbon, to which his testimony is contradictory, he told Mr. Limpert pickets surrounded him and John Mazzi told him "You're not going in there"; that Union representative Matway told him the same thing, adding... "that it was not advisable"; that he could lose his $13,000 van, or it would not be there, or destroyed; and that he (Fitzgibbon) was completely intimidated.

While I was not persuaded by the uncorroborated and conflicting testimony of Fitzgibbon with the statement he signed (Respondent's Exhibit 7), as to whether or not he was actually threatened by the picketing persons, I was persuaded that Fitzgibbon did make these statements to Mr. Limpert, as the signed statement clearly indicates. Although Fitzgibbon denied he made some of the statements to Mr. Limpert and stated he did not read the signed statement but signed it to get out of

Limpert's office, I am not persuaded by these denials and explanations of Fitzgibbon. On the contrary, I received the distinct impression from the demeanor and the contents of Fitzgibbon's testimony, as opposed to his signed statement, that he was trying to offer an acceptable justification to Mr. Limpert for not crossing the picket line, on the one hand, while denying he made such accusations against the pickets as he testified in their presence, on the other.

Fitzgibbon further testified that although Mr. Limpert was hostile and yelling that the Union was Mafia and communists controlled, he was also writing during the entire conversation. Near the end of the conversation, Fitzgibbon said he asked Mr. Limpert what was his status... was he fired, and Mr. Limpert said "You're not fired, we need you, we'll call you"; and that Mr. Limpert said the same Union people had tried to unionize his plant a couple of years ago and he threw them out... that he defeated them then and he would defeat them now; and "that they never will get into his plant

because he would move out of town or close it up." Mr. Limpert denied making these statements however, and Manager Campanella testified that he could not recall Mr. Limpert making the latter statements. 6/

Mr. Limpert asked Fitzgibbon to sign the statement he (Limpert) had been writing during their conversation. Fitzgibbon said he did not read, but glanced at the writing

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6/ I credited Fitzgibbon's testimony over Mr. Limpert's denial that he made the statements attributed to him because I was persuaded by the demeanor of both witnesses that Fitzgibbon, a relatively new employee, was telling the truth, while Mr. Limpert in this regard, was not. As a matter of logic and reality, Mr. Limpert had every reason to be angry as Fitzgibbon described him, because the terminated employees were picketing the plant, his boiler engineer and some other nonpicketing employees were refusing to cross the picket line, and the plant was without a boiler engineer. Under such frustrating circumstances, it is reasonable to believe that Mr. Limpert in anger, made the utterances attributed to him. This is especially so since these utterances are consistent with the fact that Respondent did in fact defeat the current union as well as another union during two union elections in past years; and that Plant Manager Campanella

who was present during the conversation, did not categorically deny that Mr. Limpert made the subject statements, but simply said he could not recall him making them. Moreover, Fitzgibbon's account is consistent with the credited testimony of DeMaio and the testimonial and circumstantial evidence of Respondent's hostility or animous towards the Union and the organizing employees, as previously found herein.

and signed it because after 2 hours in there, he was disgusted and wanted to get out. Mr. Limpert told him he would get a copy but he never received a copy. 7/

7/ Although Fitzgibbon testified he did not read, but just glanced at the statement signed by himself, I do not credit his testimony in this regard because as I observed him testify, I perceived him to be a literate, intelligent, and an experienced 30-year Naval veteran. The handwritten statement is legibly written in large letters and is easy to read quickly. It would appear that a person with average reading ability could read it by glancing at it in a few seconds. I am therefore persuaded by all of these factors that Fitzgibbon read the statement, understood its contents, and voluntarily signed it upon Mr. Limpert's request because he was trying to have Mr. Limpert believe he was not willingly refusing to cross the picket line in support of the pickets, but at the same time Fitzgibbon was trying to stay in

good favor with Mr. Limpert to preserve any opportunity which might have existed for Respondent to call him to work.

Based upon the foregoing credited evidence, I find that Fitzgibbon went to the plant on September 27 to pick up his check. After waiting about 30 minutes he was ordered into the office by President Limpert, where he was questioned in a hostile manner by Mr. Limpert in the presence of Plant Manager Campanella. Mr. Limpert questioned Fitzgibbon about his reasons for refusing to cross the picket line, and about what members on the picket line were talking about. Mr. Limpert also implied that Fitzgibbon left the plant's boiler's unattended for which his engineering license could be revoked, and he threatened to defeat the Union or close his plant before he would accept the Union. Without offering any evidence, Mr. Limpert told Fitzgibbon the Union was Mafia and communists controlled. At no time during the hostile discussion did Mr. Limpert ever assure Fitzgibbon against Company reprisal for answering or not answering his questions. Nor did Mr. Limpert offer any objective economic evidence as

a justification for closing his plant if the Union came in.

Under the above circumstances, Fitzgibbon was interrogated in a hostile manner by the highest Company managerial officer in the presence of the plant manager. The questions were specific, rather than general, and were designed to illict information about the picketing interest and union support of Fitzgibbon and his fellow striking employees. I therefore find that such interrogation was of a coercive and restraining character. Bourne v. N.L.R.B., 322 F.2d 47 (1964). I further find that such interrogation by President Limpert had a coercive and restraining effect upon the exercise of employees' Section 7 rights, inviolation of Section 8(a)(1) of the Act. Crown Zellenbach Corporation, 228 NLRB 224, 230. Assuming President Limpert was legitimately concerned about evidence of violence, or the threat of violence on the picket line, I nevertheless find that Mr. Limpert did not give Fitzgibbon any prerequisite safeguards (assurances, etc.) before interrogating him. Certainly, there

was no evidence in the record of violence and there was no apparent reason for interrogating Fitzgibbon in such a hostile manner. General Electric Company, 224 NLRB 1, 2 (1976); Johnnie's Poultry Co., 146 NLRB 770 (1964).

The picketing continued 1 week. When it ended September 27, DeMaio reported to work and Campanella told him he (Campanella) would have to check with Giordano and Mr. Limpert. After he checked with them Campanella told DeMaio the Company had decided to go with the other newly hired fellow.

On September 27, Margaret DiMateo learned that the picketing had ended and telephoned Manager Campanella on September 28 and asked him if Respondent wanted her to return to work. Campanella informed her that someone had been hired to replace her.

Neither Fitzgibbon, DiMatteo nor DeMaio has ever been recalled to work by the Respondent. During the week of September 20, Horatio Rivera was hired to replace Fitzgibbon and he commenced work on September

27. Also during the week of September 20, Ralph Forcinito was hired to replace DeMaio and he commenced work on September 29. No one has been hired to replace DiMatteo.

It is well established by the foregoing credited evidence that the Union (Pruitt, Jackson, Mazzi, Ocasio and Barriento) commenced picketing Respondent on September 20 for discriminatorily laying off 12 employees on June 18 because they supported the Union. Such unlawful layoffs constituted unfair labor practices. Since the picketing employees picketed Respondent with picket signs to publish the unfair labor practice of the Respondent, they became unfair labor practice strikers because the strike was caused by Repondent's unfair labor practices. Newton Corporation, 258 NLRB 659, 663-64 (1981).

According to established Board law, employees who refused to cross a picket line of their fellow employees, and who advised their employer that they will not cross the picket line, are deemed to enjoy the same status as unfair practice strikers.

They are also entitled to reinstatement with backpay upon an unconditional offer to the employer to return to work. Bartenders Local 19, 240 NLRB 240, 248 (1979), enf'd 106 LRRM 3076 (9th Cir. 1980).

However, counsel for Respondent argues that the law draws a distinction between nonpicketing employees who refuse to cross a picket line of their fellow employees based upon fear, and employees who refuse to cross such a picket line as a matter of principle. He cites N.L.R.B. v. Union Carbide Corporation, 440 F.2d 54, 56 (4th Cir. 1971), where the court reasoned that one who refuses to cross a picket line by reason of physical fear does not act on principle, and he therefore contributes nothing to mutual aid and protection in the collective bargaining process and need not retain employment. See also: Greyhound Lines, 426 F.2d 1299 (1970); Coors Container Company, 238 NLRB 1312 (1978).

In the instant proceeding all three employees, Fitzgibbon, DeMaio and DiMatteo informed Respondent they would not cross

the picket line. Fitzgibbon told Respondent he had seen many strikes and he knew Respondent was sitting on a powder keg... one little spark can set if off; that he has seen strikes get out of hand with cars being turned over and people beaten; that he had a $13,000 van truck outside and he wanted it to be there when he went out; that he did not want his van to get totaled and he personally did not want to get totaled; that picketers told him he was "not going in there"... "that it was not advisable," and he was intimidated.

Joseph DeMaio undeniably told Respondent he was not going to cross the picket line because it was dangerous in his situation as a truckdriver, and he did not know what they did to truckdrivers who drove across picket lines; and that he had spoken to his father about ti and he was not crossing the picket line.

Margaret DiMatteo did not report to work on September 20 and 21, 1982. However, on September 23, she informed Respondent she was not going to cross the picket line

because she feared for herself and her vehicle which she drove to work; and that her father was a truckdriver and she has always respected that.

Thus it is clear that each employee, Fitzgibbon, DeMaio and DiMatteo informed Respondent that the reason he or she would not cross the picket line was, in fear for their personal safety. Fitzgibbon and DiMatteo also expressed a fear of becoming victim to the unauthorized use of, or vandalism of their vehicle. However, these subjective declarations of fear for crossing the picket line, in the absence of any threatening or violent conduct by participants in the picketing, are naked declarations without any foundation in the record. Nevertheless, without evaluating the validity of such stated fears, it is particularly noted that neither employee (Fitzgibbon, DeMaio or DiMatteo) ever indicated he or she was not supporting or sympathizing with the picketing dischargees. In fact DiMatteo's statement to Campanella that her father was a truckdriver and she had grown up respecting that, as well as Fitzgibbon and

DeMaio appearing almost daily at the plant near the picketers, certainly suggest they were morally supportive of, or sympathetic with the protest of those picketing. Under these circumstances it is both possible and probable that these three employees purposefully told management their refusal to cross the picket line was based upon fear, with hopes of leading management to believe they were not supportive of the strike and thereby, avoid antagonizing management against their return to work.

In any event, while the U.S. Court of Appeals for the Fourth Circuit has recognized a distinction between a refusal based upon fear, and a refusal based upon principle, the Board has not recognized this distinction enunciated by the Court in Union Carbide Corporation, supra. On the contrary, as the Administrative Law Judge stated in Congoleum Industries, Inc., 197 NLRB 534, 537 (1972), and adopted by the Board:

> However, contrary to the court's holding in Union Carbide, the Board's decisions

regard an employee's motive for honoring a picket line as irrelevant. Thus, in Cooper Thermometer, supra, the Board said, at 504:

> ...The focal point of inquiry in determing whether [an employee's] refusal to cross the picket line to perform production work was a protected activity must of course be the nature of the activity itself rather than the employee's motives for engaging in the activity.

Also see Overnight Transportation Company, 212 NLRB 515, 516 (1974), fn. 6, where the Board said:

> Our action in adopting the Administrative Law Judge's Decision as modified herein should not be construed as endorsing his observations with respect to the views on concerted activities expressed by the Court of Appeals for the Fourth Circuit in N.L.R.B. v. Union Carbide Corporation,

440 F.2d 54, 56 (C.A. 4, 1971), cert. denied 404 U.S. 826 (1971).

Thus, the undersigned is bound to apply established Board precedent where the Board or the Supreme Court has not held otherwise.

Accordingly, Fitzgibbon, DeMaio and DiMatteo having communicated to management their refusal to cross the picket line of their unfair labor practice striking fellow employees, they were engaged in concerted activity protected by the Act. Bartenders Local 19, supra. Moreover, the uncontroverted evidence shows that the picketing ended on September 27. Fitzgibbon went to the plant on that afternoon to pick up his paycheck. While there during a heated discussion with management, he asked Mr. Limpert was he fired and the latter said "No, you are not fired, that the Company will call you when needed." Since Fitzgibbon did not tell Respondent he did not want to return to work, and he had previously (September 20) advised Respondent he would return to work when the picketing ended, Respondent knew that Fitzgibbon was waiting

for Respondent to allow him to work. Under these circumstances, it is clear that Fitzgibbon's offer to return to work was conditioned only upon cessation of the picketing, which occurred before he entered Mr. Limpert's office on September 27. Thus, Fitzgibbon's inquiry about his employment status was a reasonable way of renewing his offer to return to work, as well as making a legitimate inquiry, considering the hostile and coercive climate of the meeting with Mr. Limpert.

It is well established by the evidence that DeMaio and Fitzgibbon unconditionally offered to return to work on September 27 when the picketing ended. On the next day, September 28, 1982, DeMatteo unconditionally offered to return to work. Plant Manager Campanella informed DeMaio and DiMatteo they had been replaced by Respondent. Since Fitzgibbon, DeMaio and DiMatteo's refusal to cross the picket line was protected activity, Respondent's refusal to allow them to return to work was a discriminatory discharge of them, in violation of Section 8(a)(3) and (1) of the Act. Newton

Corporation, supra; The Laidlaw Corporation, 171 NLRB 1366 (1968), enf'd 4141 F.2d 99 (7th Cir. 1969). Consequently, Fitzgibbon, DeMaio and DiMatteo are entitled to reinstatement with backpay. Bartenders Local 19, supra.

Finally I conclude and find that Respondent's refusal to recognize the Union after the Union obtained the support of a majority of its employees on June 17 and so notified Respondent to that effect on June 18 and 21, 1982, Respondent simultaneously engaged in conduct to undermine, or likely to undermine the Union's majority status and make a fair election impossible. Such conduct by Respondent constituted a refusal to bargain in good faith, in violation of Section 8(a)(5) of the Act. Occidental Paper Corporation, 227 NLRB 719, 722 (1977).

It having been found that Respondent, while having knowledge of the union organizing activities of its employees on June 17, 1982, nevertheless engaged in restraining conduct and coercive interrogation of its

employees on June 17 and 19, threatened an employee on June 19 with closure of its plant before it would accept unionization of its plant; coercively interrogated an employee on September 27 about his reasons for refusing to cross the picket line, and threatened him with closing its plant before it would permit unionization of its plant, in violation of Section 8(a)(1) of the Act; that Respondent on June 17 discriminatorily announced the immediate reduction in the number of days worked per week; and that on June 18 discriminatorily laid off 12 of its employees, all because its employees engaged in union activities on June 3, 16 and 17, discharged three other employees because they engaged in other protected activities (refusal to cross the picket line) on September 20 through 27, 1982; and that since June 18-21, 1982, Respondent has failed and refused to recognize the Union as the duly designated collective bargaining representative of its employees, in violation of Section 8(a)(5) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct, and, that it take

certain affirmative action to effectuate the policies of the Act.

(Bargaining Order)

Finally the question is presented as to whether the established unfair labor practices committed by the Respondent during the organizing activities of its employees, were of such consequential magnitude as to interfere with the election processes by dissipating the Union's majority status and precluding the holding of a fair election. In answering this question, it is first noted that it is clearly established by the evidence of record that 19, and at a later date 20, of the 26 employees in the stipulation of employees who would constitute an appropriate unit for collective bargaining, signed a single purpose authorization card designating United Food and Commerical Workers Union, Local 56, AFL-CIO, chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC herein called the Union, as their collective bargaining agent. The Respondent has not presented any evidence showing that it had independent knowledge

that the Union lacked a majority status either before or subsequent to its commission of the unfair labor practices herein found.

In view of the foregoing findings, I further conclude and find that Respondent's afore-described unlawful conduct constituted the commission of independent, substantial and pervasive unfair labor practices disruptive of election conditions or processes, which prevent a free election and cause the dissipation of the Union's majority, warranting the issuance of a collective bargaining order. N.L.R.B. v. Gissel Packing Company, 395 U.S. 575 (1969), and Steel-Fab, Inc., 86 LRRM 1474 (1974); Ohio New and Rebuilt Parts, Inc., 267 NLRB NO. 66 (1983).

I also conclude and find that Respondent's June 18, 1982, mass layoff of 12 of its 32 employees who had signed union authorizationcards, and its subsequent discharge of three employees for refusing to cross the unfair labor practice picket line is a particularly egregious violation sufficient to support a bargaining order.

Edmund Homes, Inc., 255 NLRLB 809, 816 (1981); Dennis G. Marietta and Frank M. Marietta t/a Marietta Contracting, 251 NLRB 177, 183 (1980), enf'd 108 LRRM 2864 (3rd Cir. 1981).

Conclusions of Law

1. By discriminatorily layinf off (discharging) Pauline Pruitt, Laverne Jackson, Donna Barriento, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker, Gail Ocasio, John Mazzi and Susan Johnson on June 18, 1982, because they supported the Union, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

2. By discriminatorily announcing and reducing the number of days worked per week on June 17, 1982, because the employees were supporting the Union, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

3. By discriminatorily discharging employees Raymond Fitzgibbon, Joseph DeMaio and Margaret DiMatteo, by refusing to allow them to return to work upon their unconditional offer to return to work, because they refused to cross the picket line, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By coercively interrogating an employee on June 17 and 19, 1982, about his Union interest and activities, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees on June 19 and September 27, 1982, with closure of its plant because employees supported the Union, Respondent violated Section 8(a)(1) of the Act.

6. By coercively interrogating employees about their reason for refusing to cross the picket line, Respondent violated Section 8(a)(1) of the Act.

7. By refusing to recognize and bargain with the Union since June 21, 1982, while

engaging in a series of pervasive unfair labor practices which undermined and tended to undermine the Union's majority status and impede the election process, Respondent violated Section 8(a)(5) and (1) of the Act.

8. A bargaining order is necessary to remedy the Respondent's unfair labor practices.

Remedy

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct, and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off (discharged) Pauline Pruitt, Laverne Jackson, Donna Barriento, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker, Gail Ocasio, John Mazzi and Susan Johnson; and

having also discriminatorily discharged Raymond Fitzgibbon, Joseph DeMaio and Margaret DiMatteo, by refusing to allow them to return to work when they offered to return to work, Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge or the date of a proper offer of reinstatement, less earnings, as prescribed in F.W. Woolworth, Co., 90 NLRB 289 (1950), plus interest as computed in Florida Steel Corp., 231 NLRB 651 (1977).

ORDER 8/

The Respondent, Limpert Brothers, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting Local 56, AFL-CIO, Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC, or any other union.

(b) Discharging or otherwise discriminating against employees because they refuse to cross a union picket line of fellow employees.

8/ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Coercively interrogating employees about their union interest or activities.

(d) Threatening employees with plant closure because they support a union.

(e) Coercively interrogating employees about their reason for refusing to cross the picket line.

(f) Failing and refusing to recognize and bargain with Local 56, AFL-CIO-CLC, Chartered by United Food and Commercial Workers Internation Union, AFL-CIO-CLC, as the exclusive representative of employees in the appropriate unit.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with Local 56, AFL-CIO, Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC as the exclusive collective

bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance, shipping and laboratory employees employed by Limpert Brothers, Inc. at its Vineland, NJ facility, excluding all office clerical employees, salesmen, guards and supervisors as defined in the National Labor Relations Act:

(b) Offer Pauline Pruitt, Laverne Jackson, Donna Barriento, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker, Gail Ocasio, John Mazzi, Susan Johnson, Raymond Fitzgibbon, Joseph DeMaio, and Margaret DiMatteo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole

for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Remove from Company files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at Limpert Brother, Inc. plant in Vineland, New Jersey, copies of the attached notice marked "Appendix." 9/ Copies of the notice, on forms provided by the Regional Director for Region 4, after

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9/ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and

> Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act on specifically found.

JD--107--84

Dated, Washington, D.C. March 16, 1984

Elbert D. Gadsden
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

an agency of the

UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

TO organize

TO form, join, or assist any union

TO bargain collectively through representatives of their own choice

TO act together for other mutual aid or protection

TO choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting LOCAL 56, AFL-CIO, Chartered

by United Food and Commercial Workers International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to close our plant for supporting Local 56, AFL-CIO, Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT in any like or other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production, maintenance, shipping and laboratory employees

employed by Limpert Brothers, Inc. at its Vineland, NJ facility, excluding all office clerical employees, salesmen, guards and supervisors as defined in the National Labor Relations Act:

WE WILL offer Pauline Pruitt, Laverne Jackson, Donna Barriento, Carlos Gonzalez, Miguel Velez, Carmen Rodriguez, Leonard Graff, Lewis Smith, Sharon Parker, Gail Ocasio, John Mazzi, Susan Johnson, Raymond Fitzgibbon, Joseph DeMaio and Margaret DiMatteo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting form their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference

to their discharge and that their discharge will not be used against him in any way.

LIMPERT BROTHERS, INC
(Employer)

Dated_____By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.
1 Independence Mall - 7th Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, Telephone (215) 596-7643

[586] EXAMINATION OF TONY CAMPANELLA, PLANT MANAGER, BY MR. BOSCH:

Q. Did anything happen the following Monday that you noted?

A. Yeah. When I came into work about 7:00, there was a picket line in front of the plant.

Q. What day was this?

A. It was on the 27th, I believe. The 20th or 21st; 20th.

Q. The Monday --

A. The Monday after; the Monday the second week I was there.

Q. How many pickets were there?

A. There were several. I don't know the exact count.

Q. Were they wearing signs?

A. Yes, they were.

Q. What did the signs say?

A. I didn't get close enough to see them good. All I could see was the big letters, "unfair labor."

Q. Did all your employees report to work that day?

A. All except three.

Q. Who didn't report to work?

A. Margaret DiMatteo, Fitzgibbon and Joe DeMaio.

REDIRECT EXAMINATION

[610] BY MR. BOSCH:

Q. During your period of employment at Limpert Brothers, were you ever involved in any Union election?

A. Yes.

Q. When?

A. I don't know the exact date but several years back, probably once in the 60's and once in the 70's.

Q. What was the Union involved in the 60's?

MS. NAVARRO: Objection, Your Honor. It goes beyond the scope of cross, these questions as to the Union election, past Union elections.

MR. BOSCH: On cross, you were talking about beating the Union.

JUDGE GADSDEN: This is redirect. He may ask that question. I think he has made the connection.

BY MR. BOSCH: (Resuming)

Q. What was the Union in the 60's?

A. I think it was Amalgamated Meat Cutters.

Q. Is that the same Union that was picketing on September 20th?

MS. NAVARRO: Objection, Your Honor.

How would he know?

THE WITNESS: I don't know.

JUDGE GADSDEN: He gave a name. Is that the name of this Union?

MR. BOSCH: Can we propose a stipulation that the name of the Union has changed since the 60's?

MR. SLACK: Perhaps we could consult.

JUDGE GADSDEN: Off the record.

(Whereupon, discussion was held off the record.)

MS. CRANGLE: I would be willing to stipulate that by merger between the Retail Clerks International Union and the Amalgamated Meat Cutters, a new Union emerged which is known as the United Food and Commercial Workers Union, and that Local 56 is a local thereof.

JUDGE GADSDEN: Do all parties agree to the proposed stipulation?

MR. SLACK: General Counsel agrees.

[612] MR. BOSCH: Respondent agrees.

JUDGE GADSDEN: The stipulation is received.

BY MR. BOSCH: (Resuming)

Q. Was there an election in the 60's?

A. Yes, there was.

Q. Who won the election?
A. We won the election, Limpert Brothers.
Q. No union came in?
A. No.
Q. Was there an election in the 70's?
A. Yes.
Q. What union was involved then?
A. Teamsters, 676.
Q. What was the results of that election?
A. Limpert Brothers won.
Q. Do you recall the vote?
A. Yes.
Q. What was the vote?
A. 25 to 1.
Q. To your knowledge, did Limpert Brothers commit any unfair labor practices during either of those campaigns?

MS. CRANGLE: I am going to object Your Honor.

JUDGE GADSDEN: Sustained. It calls for a legal conclusion.

[613] BY MR. BOSCH: (Resuming)
Q. Was there any talk about those two elections during the week of the strike?
A. No.
Q. Was there any talk about those two previous union organizing attempts?

A. Not that I recall. I don't recall any.

No. 86-919

In the Supreme Court of the United States

OCTOBER TERM, 1986

LIMPERT BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

14 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner's unlawful conduct, including the discharge of 15 employees because of their union support, precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A5-A7) is reported at 800 F.2d 1135 (Table) and the denial of rehearing (Pet. App. A1-A4) at 800 F.2d 333. The decision and order of the National Labor Relations Board (Pet. App. A8-A16), including the decision of the administrative law judge (Pet. App. A17-A130), are reported at 276 N.L.R.B. No. 37.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1986. Petitioner's timely petition for rehearing was denied on September 5, 1986. The petition for a writ of certiorari was filed on December 4, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1982, Local 56, United Food and Commercial Workers International Union (the Union) began an organizational campaign at petitioner's plant (Pet. App. A17). On June 16, eight of petitioner's 32 production employees signed union authorization cards at a union organizational meeting. Pet. App. A24-A25.[1] Eleven more employees signed cards the following day. Pet. App. A25.[2]

During the morning of June 17, an employee who had declined to sign an authorization card told petitioner's managers, Giordano and Mangine, about the union organizing campaign. Pet. App. A54. Later that day, petitioner called an employee meeting at which Giordano announced that because of declining sales the work week would be cut to four or possibly three days, but that petitioner would try to avoid any layoffs. Giordano added that the employees and management were like a "family" and that she knew it would be difficult for them to find jobs, so there would be no layoffs. This was the first time that the employees heard any mention of cutbacks or layoffs due to petitioner's financial problems. Pet. App. A55.

On June 18, President Limpert and Managers Giordano and Mangine held another employee meeting. Limpert announced that petitioner was faced with financial problems due to a lack of sales and the general state of the

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[1]The list of employees who signed cards on June 16 is misprinted in petitioner's appendix, omitting one employee—John Mazzi—included in the administrative law judge's published decision. See 276 N.L.R.B. No. 37, J.D. 4 (Sept. 24, 1985).

[2]The administrative law judge lists only ten employees as having signed cards on the 17th. Pet. App. A25. Based on the subsequent discussion (Pet. App. A31-A32), however, it is clear that one additional employee—Miquel Velez—also signed on that day. Velez's card is included in the total of 19 cards found to be valid by the administrative law judge. Pet. App. A53.

economy and consequently would have to lay off some employees. Giordano and Mangine distributed layoff notices and final paychecks to ten employees, all of whom had signed union authorization cards. Pet. App. A68. Two additional employees who had signed cards were permanently laid off later in the day. Employees who asked Limpert or Giordano whether they were being laid off or discharged were told they were being discharged. Pet. App. A56-A59, A68.

The next day, President Limpert told one of his remaining employees that he would close his doors before allowing a union in. Pet. App. A60-A61. On the same day, Plant Manager Mangine told two employees that the employees had been laid off because "management knew of the union activity." Mangine also remarked that work was accumulating and petitioner was short of production workers. Pet. App. A61-A62.

On Monday, June 21, petitioner received a letter from the Union requesting recognition and stating that a majority of employees had designated the Union as their collective bargaining representative. On June 22, petitioner denied the Union's request. Pet. App. A63-A64.

Slightly more than one week after the mass discharge, petitioner began rebuilding its work force with new hires. By August 4, its work force had increased to 31; by August 9, it stood at 38. Although in early September the work force declined to 30, it increased again in mid-September and between September 14 and September 30 it exceeded all pre-layoff levels. The size of the unit decreased again in November when petitioner experienced its usual seasonal decline in business. Pet. App. A64-A65, A81.

On September 20, the Union established a picket line at petitioner's plant to protest the June 18 mass discharge. Some of the discharged employees joined the picket line.

Pet. App. A94. Three of petitioner's employees refused to cross the picket line and were discharged. Pet. App. A94-A97. Subsequently, President Limpert told one of the discharged employees when he came to the plant to pick up his paycheck that the Union had tried to organize his plant before but he had "defeated them then and he would defeat them [again]." He said "that they never will get into his plant because he would move out of town or close it up." Pet. App. A97, A99-A100.

2. The National Labor Relations Board, adopting the findings and conclusions of an administrative law judge, held that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by interrogating employees about their union activities, by threatening to close the plant if it became unionized, and by announcing a cutback to a three- or four-day work week. Pet. App. A9 n.1, A66, A67-A68, A84-A85, A103. The Board also found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging 12 employees shortly after they signed union authorization cards and by discharging three employees because they refused to cross a lawful picket line established to protest the initial 12 discharges. Pet. App. A9 n.2, A112. In finding the discharges of the 12 employees to be unlawful, the Board rejected petitioner's contention that the discharges were motivated by economic considerations and not by anti-union animus. Pet. App. A76-A85. Finally, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the Union since June 21, when the Union demanded recognition on the basis of authorization cards signed by a majority of the employees in an appropriate unit, while at the same time engaging in pervasive unfair labor practices that undermined the Union's majority status and made a fair election impossible. Pet. App. A113-A114.

The Board ordered petitioner, *inter alia*, to offer the 15 employees discharged on June 18 and September 27 immediate and full reinstatement to their former jobs; to make them whole for any loss of pay or other benefits they might have suffered as a result of its discrimination against them; and to recognize and bargain, upon request, with the Union. Pet. App. A119-A120. In finding a bargaining order necessary to remedy petitioner's unfair labor practices, the Board pointed to petitioner's "substantial and pervasive unfair labor practices"—especially the mass layoffs of employees who had signed authorization cards and the subsequent discharge of employees who refused to cross the picket line—and concluded that these actions had dissipated the Union's majority and precluded a free election. Pet. App. A115-A117.

3. The court of appeals, without opinion, upheld the Board's decision and enforced its order. Pet. App. A5-A7.

ARGUMENT

Petitioner does not challenge the Board's finding, upheld by the court of appeals, that it reacted to the Union's organizing efforts by an unlawful campaign encompassing threats, interrogations and a mass discharge of union supporters.[3] Rather, petitioner contends that, despite petitioner's unfair labor practices, the court erred in sustaining the Board's decision that petitioner must meet and bargain with the Union on request. Pet. 8. But the court's decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is unwarranted.

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[3]Petitioner does assert in its statement (Pet. 4) that the discharges were motivated by economic considerations. This claim, however, was explicitly rejected by the Board (see Pet. App. A76-A85), and the petition does not contest the propriety of that finding.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may order an employer to bargain with a union when the employer has committed unfair labor practices that "tend to preclude the holding of a fair election." 395 U.S. at 594. The Court stated that the Board may order an employer to bargain with a union not selected in a Board election both in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices (395 U.S. at 613-614), and in cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (*id.* at 614). In such cases, the Court recognized, authorization "cards may be the most effective—perhaps the only—way of assuring employee choice." *Id.* at 602. The Court added that precluding the Board from issuing bargaining orders in such circumstances "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain' " (*id.* at 610, quoting *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944)). Thus, the Court indicated that the Board may order an employer to bargain with a union that has not been certified in a Board election whenever it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (395 U.S. at 614-615).

In the instant case, 19 employees, a clear majority of the 32-member bargaining unit, signed cards appointing the union as their authorized representative. Petitioner's immediate response was to fire 12 of those employees. In light of the specific finding adopted by the Board that the purpose of the firings was to eliminate the pro-union majority and frustrate the efforts of employees to unionize the plant (Pet.

App. A84; A115-A117), this was a paradigm case for the issuance of a bargaining order. Petitioner's actions were both outrageous and pervasive, satisfying even the stricter of the two standards set out in *Gissel* and fully justifying the Board's conclusion that petitioner's unfair labor practices prevented a free election and caused the dissipation of the Union's majority, thereby warranting the issuance of a bargaining order based on the cards (Pet. App. A116).

2. Petitioner does not contend that the unfair labor practices committed by it were not pervasive and serious within the meaning of *Gissel*. Instead, petitioner claims (Pet. 8-10) that the Board improperly failed to consider such countervailing factors as the passage of time, employee turnover, and the lack of further unfair labor practices, all of which indicate that a fair election could be held despite petitioner's actions. There is no merit to that contention. None of the factors cited by petitioner undermines the Board's conclusion that traditional remedies would not suffice to ensure a fair election, much less demonstrates that the issuance of the bargaining order was "patently improper and unfair" (Pet. 9-10).

Mere passage of time does not obviate the need for a bargaining order; to hold otherwise "would in effect be rewarding the employer" by permitting him "to delay or disrupt the election processes and put off indefinitely his obligation to bargain." *Gissel*, 395 U.S. at 610-611. See *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 265 (3d Cir. 1982) (en banc).

Nor can petitioner rely on the effects of high turnover since it unlawfully fired the employees in question. The lower courts have uniformly held that turnover caused by the employer is not a basis for holding that a fair and reliable election can be conducted. See, *e.g.*, *NLRB* v.

Gordon, 792 F.2d 29, 34 (2d Cir. 1986), cert. denied, No. 86-392 (Nov. 3, 1986); *NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100-101 (2d Cir. 1985); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 264-265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981).

Finally, contrary to petitioner's contention (Pet. 9 & n.1), its unfair labor practices did not cease with the mass discharge. Three months later, when three employees refused to cross a valid picket line established to protest the initial discharges, petitioner fired them as well and reiterated its vow to close down rather than to operate with a union. Petitioner's reliance (*ibid.*) on the picket line to establish that employees were no longer intimidated by its unlawful conduct is incredible; the only employees who joined the line were those already discharged who had nothing to lose, and the three employees who honored the line were promptly fired—further driving home the message to the remaining work force that union support would mean job loss.[4]

The decision of the administrative law judge adopted by the Board developed at length the factual circumstances of this case (Pet. App. A19-A115) and clearly articulated ample grounds for concluding that a fair and reliable election could not be conducted (Pet. App. A115-A117). No further discussion of the inapposite factors cited by respondent was required. *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d at 1081-1082.

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[4]The fact that petitioner had not resorted to such measures in two earlier organizational campaigns (see Pet. 9) provides no assurance to the employees that it would not again retaliate against union supporters where, as here, the employees appeared to have successfully mounted a union campaign.

3. To the extent that the petition can be read as arguing that the Court should modify *Gissel* by articulating more specific limitations on the Board's discretion to issue a bargaining order (see, *e.g.*, Pet. 6-8), this case is a wholly inappropriate vehicle for such fine tuning because of the egregious nature of petitioner's conduct. Under any plausible standard that permitted the issuance of a bargaining order, this case would qualify. More fundamentally, any such rigid calculus would preclude the flexible reliance upon experience that this Court has recognized is essential to the Board's determination of when a bargaining order is appropriate. *NLRB* v. *Gissel Packing Co.*, 395 U.S. at 612 n.32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

JANUARY 1987